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MARY KETT,

Appellee,

v.

THE RETIREMENT BOARD OF THE
FIREMEN'S ANNUITY AND BENEFIT
FUND OF CHICAGO,

Appellant.

APPEAL FROM CIRCUIT

COURT, COOK COUNTY.

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE
COURT.

This is an appeal by defendant from an order of the
trial court quashing its return to a common-law writ of
certiorari.

Plaintiff, Mary Kett, filed her petition for
certiorari to review a decision of the defendant denying
her further application for a widow's compensation annuity,
under Section 33 of the Firemen's Annuity and Benefit Act,
Ill. Rev. Stat. 1953, ch. 24, par. 944.33, in addition to
her application for a widow's age and service annuity under
the Act which defendant Retirement Board allowed. Section
33 of the Act provides a compensation annuity "for the widow
of any fireman whose death shall result from the performance
of an act or acts of duty...." Section 12 of the Act, Ill.
Rev. Stat. 1953, par. 944.12, defines "Act of duty" as
"Any act imposed on a fireman by the ordinances of such
city, or by the rules or regulations of the fire department
thereof, or any act performed by a fireman while on duty,
having for its direct purpose, the saving of the life or
property of another person." Plaintiff did not file a
brief and argument in this court.

There is no question but what the Firemen's Annuity

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and Benefit Fund of Chicago is a pension fund. Dodge v. Board of Education, 364 Ill. 547, 556. Dodge v. Board of Education, 302 U. S. 74, 81. The Retirement Board is a board of trustees of a pension fund and as such is a quasi-judicial body (Eddy v. The People, 218 Ill. 611) with power to hear testimony and determine whether or not the plaintiff was entitled to additional compensation because her husband's death had resulted from the performance of an act as a fireman while on duty for the purpose of saving the life or property of another person. The law is well settled in this State that in common-law certiorari proceedings to review the order of the Retirement Board denying plaintiff's application for compensation annuity, the reviewing court has only the power to search the record for the purpose of ascertaining whether the Retirement Board had (1) jurisdiction; (2) exceeded its jurisdiction; (3) proceeded according to law; and (4) acted on evidence that fairly tended to support its decision. Byrnes v. Retirement Board, 339 Ill. App. 55, and cases therein cited. On this appeal we are only required to determine whether there was anything in the record which fairly tended to sustain the findings of the defendant.

The record discloses that plaintiff's decedent, Edmond J. Kett, was a lieutenant in the Fire Department of the City of Chicago and was assigned to Engine Company 11 at 19 East Ohio street. On May 6, 1949, he was living at the fire station because plaintiff was ill and in the

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hospital. On this date he fell down the stairs leading from the upper floor of the engine house. He was found lying on the apparatus or ground floor, bleeding from the nose, mouth and ears. He died on May 14, 1949, as a result of the injuries sustained. There is a conflict in the evidence as to whether Lieutenant Kett was on duty at the time he fell down the stairs leading from the upstairs lavatory to the apparatus floor.

The record reveals that on the day in question, as shown by the roll call, Lieutenant Kett was not on duty. Instead, Captain Strom was. The conflict arises because the record discloses that Lieutenant Kett fell down the stairs at approximately 2:25 p.m. and the fire house journal reads: "2:00 p.m. Lt. Kett relieved Capt. Strom--Changing shifts." "2:30 p.m. Capt. Strom returned to duty." These entries were made at Captain Strom's direction after the accident. Captain Strom admitted that Lieutenant Kett had not signed in, but stated that he had reported for duty and was on duty at the time. Captain Strom admitted that it was customary to make a notation in the journal at the time the change in shifts occurred. This was not done. Further, Captain Strom stated that he worked continuously from 8:00 a.m. on May 5 to 6:30 p.m. on the 6th; that he was "on duty from 8:00 a.m. of the 5th to 7:00 o'clock p.m. of the 6th--that was my regular assignment for duty." All of the others testifying, members of the engine

company, either did not know whether Lieutenant Kett was on duty after 2:00 p.m. on the 6th, or were uncertain. In this view of the record, raising a question of the credibility of the witnesses, this court cannot say that the Board's finding that Lieutenant Kett was not on duty at the time of the occurrence is without foundation.

If we were to concede that the trial court was justified in finding that Lieutenant Kett at the time of the occurrence was on duty, we would still be unable to conclude that there is evidence in the record to sustain a decision opposed to that reached by the Board.

Lieutenant Kett was called by one of the firemen to answer a telephone call, on the "back 'phone" in the upstairs lavatory. The telephone referred to was unlisted and private, provided by the firemen for their own convenience and at their private expense. The only other means of communication in the fire house were the telegraph sounder or "the joker"; the "joker 'phone," relaying "still" alarms and other pertinent information to the fire house; the marshal line, communicating with City Hall; and the "one-armed 'phone," so-called because it received incoming calls and was used only if the other means of communication failed. None of these means of communication except the "back" telephone were to be used for personal calls by the members of the engine house company. The voice calling on the private telephone and requesting Lieutenant Kett was that of a woman. She apparently hung up when no one

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responded to the call, because of the turmoil, confusion and activity following Lieutenant Kett's fall as he was walking downstairs to take the call. The voice was later identified as that of a Mrs. McGrath, Lieutenant Kett's sister.

There is no evidence in the record to sustain a finding that Lieutenant Kett was injured while performing an act imposed on a fireman by the ordinances of the City of Chicago, or "by the rules or regulations of the fire department thereof," or an act while on duty "having for its direct purpose, the saving of the life or property of another person" as provided by the statute.

As we have stated, this is a common-law writ of certiorari proceedings. The trial court had no power to weigh the evidence. It could only examine the record for the purpose of ascertaining whether or not it fairly tended to sustain the action of the Retirement Board. Byrnes v. Retirement Board, supra; Carroll v. Houston, 341 Ill. 531; Hopkins v. Ames, 344 Ill. 527. The record amply sustains the action of the defendant in denying plaintiff's application.

It was therefore error for the trial court to enter an order quashing the record of proceedings before the defendant Retirement Board. The order of the trial court is reversed.

Order reversed.

McCormick, P. J., and Schwartz, J., concur.

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CARL F. WILSON,)	APPEAL FROM MUNICIPAL
Appellant,)	
)	COURT OF CHICAGO.
v.)	
WILLIAM G. MILOTA, Bailiff,)	
and LaSALLE NATIONAL BANK,)	
as Trustee under Trust)	
No. 7286,)	
Appellees.)	

91A^{2d} 254

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment entered against him on a trial of right of property. The case was heard by the court without a jury. The dispute is between the plaintiff Wilson, as the purchaser of certain personal property from one Foster, and the defendant, LaSalle National Bank as Trustee, a creditor who levied upon the goods while they were still in the possession of Foster.

On November 13, 1954, Wilson and Foster entered into an agreement whereby Wilson purchased certain property from Foster, including the goods levied on, for \$1875. A bill of sale to Wilson was executed by Foster. It also contained an agreement to the effect that Foster had printing in process in Wilson's shop, that the purchase price was to be paid by Wilson by his doing that printing job and certain other printing work, all of which jobs, it was said, would total the amount of cash for which the equipment was sold. Wilson was given 120 days in which to complete the work. He then undertook to give Foster a judgment note for \$1875 which, it was said, was "to insure the faithful performance of work being done by the Buyer for the Seller, and that said

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Note for \$1075 shall be for one hundred and twenty (120) days only." The note dated November 13, 1954, was executed by Wilson payable 120 days after date. This same promissory note was marked "Paid in full, B. Leo Foster, 11/13/54" (the same day as the sale). The date appears to be "11/13" but could be "11/18." The only explanation offered for cancellation of the note is that Wilson substantially completed all the printing work Foster had with him on November 13, 1954; that the work "was completed in full a few days thereafter." Plaintiff testified that although he had 120 days in which to do the work, he did in excess of \$2000 worth of work between Saturday, November 13, and Monday, November 15, 1954, and that, he says, is why the note was marked paid.

Prior to November 13, 1954, Goes Lithographing Company had an execution issued on a judgment which it had obtained against Foster and levied on the same goods as are here involved. The LaSalle National Bank made its levy on the goods on November 26, 1954. It is conceded that the lien of Goes Lithographing Company was superior and the satisfaction of that lien left only \$3.70, which is the real amount in issue in the matter now before us.

Foster testified that at the time of the sale he had executed a vendor's affidavit in which he stated that he had no creditors. He admitted that the affidavit was false. It is not shown that Wilson had any knowledge of the falsity of the affidavit and as to him this would constitute a compliance with the Bulk Sales Act. However, that would still leave the

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question of whether the sale was bona fide. The trial court found that it was not, and his finding in that respect should be sustained unless it is against the manifest weight of the evidence. Hadley v. White, 367 Ill. 406, 11 N.E. 2d 813; Mannen v. Norris, 338 Ill. 332, 170 N.E. 273; Morrison v. Beers, 327 Ill. 139, 158 N.E. 2d 371. It was proper for the trial court to take into account the fact that Foster had retained possession of the goods levied on and had such possession 13 days after he had given Wilson a bill of sale. This, together with the other facts, such as the giving of the note, its being marked "paid in full" on the same day as given, the allowance of 120 days for Wilson to perform the printing job, the assertion that the work was completed within two days, and other facts and circumstances in the case amply support the finding and judgment of the court.

Judgment affirmed.

McCormick, P. J., and Robson, J., concur.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

February Term, A. D. 1956

General No. 10034

Agenda No. 17

Kaywin Kennedy, Executor of the Last Will
and Testament of Sara M. Hart, Deceased, et al.,

Plaintiffs,

vs

Susan Tate et al.,

Defendants.

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Corn Belt Bank of Bloomington, a corporation,
and Robert Allen Hart,

Defendants-Appellees,

vs

Esther Jo Hawks Stephenson, Kathryn
Bernice Kennedy LaBonts, Martha Jean
Kennedy Swenson and Susan Tate,

Defendants-Appellants.

CARROLL, J.

The Last Will and Testament of Sara M. Hart, a resident
of Bloomington, McLean County, Illinois, who died May 15, 1944
contained the following clause:

"I give and bequeath to my nephew Robert Allen
Hart \$5,000.00 of the amount due me on deferred
Certificates of the Corn Belt Bank of Bloomington,
Illinois, to be his absolutely. I also give and
bequeath to the said Robert Allen Hart, now

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Appeal from
Circuit Court of
McLean County

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cashier of said Corn Belt Bank, for and during his natural life, 40 shares of stock in said Bank, he to have as his own absolute property all income and profits of said shares including all dividends, whether cash or stock dividends, which may be declared after my death and with full power to vote the shares hereby devised to him during his lifetime. Upon the death of the said Robert Allen Hart, said 40 shares shall go to and become the property of Esther Jo Hawks, Katherine Kennedy, Martha Jean Kennedy and Susan Tate, the latter being the daughter of Ruth Hart Tate, share and share alike."

At the time of her death she owned 40 shares of the capital stock of the Corn Belt Bank, a state bank organized under the banking laws of Illinois. On July 3, 1944 her Will was admitted to Probate and Kaywin Kennedy, plaintiff herein, was appointed executor thereof.

On June 20, 1945, the 40 shares of stock owned by decedent were reissued by the Bank to Robert Allen Hart for life with remainder over to Esther Jo Hawks Stephenson, Kathryn Kennedy LaBonte, Martha Jean Kennedy and Susan Tate, the four persons named as remaindermen in the Will.

On December 2, 1949, the Board of Directors of the Corn Belt Bank adopted the following resolution:

"BE IT RESOLVED by the Board of Directors of the Corn Belt Bank, Bloomington, Illinois;

That it is to the best interests of the Corn Belt Bank, Bloomington, Illinois, that the capital stock of the Bank be increased from \$100,000.00, consisting of 1000 shares of a par value of \$100.00 per share, to \$200,000.00, consisting of 2000 shares of a par value of \$100.00 per share.

That the increase of said capital stock be accomplished by a transfer from the undivided profits account to the capital account and that each shareholder be entitled to one share of the capital stock dividend for each share held as of February 1, 1950.

That the officers and Directors be authorized and empowered to take such action as is necessary in order to accomplish the desired increase."

On January 6, 1950 the Stockholders of said Bank passed the following resolution:

"BE IT RESOLVED: By the Stockholders of the Corn Belt Bank, Bloomington, Illinois:

1. That it is for the best interest of the Corn Belt Bank, Bloomington, Illinois, to increase the capital stock of the Bank from \$100,000.00 consisting of 1,000 shares of par value of \$100.00 per share, to \$200,000.00 consisting of 2,000 shares of a par value of \$100.00 per share.
2. That the Directors are authorized, directed and empowered to take such action as is necessary to accomplish said increase of the capital stock."

The records of the Bank show that on February 1, 1950, there was a credit balance of \$128,971.43 in the undivided profit account, a credit balance of \$200,000.00 in the surplus account, and a credit balance of \$100,000.00 in the capital account. The Bank records further show that on February 2, 1950 the president of the Bank made two entries in the Bank's journal, namely, a debit of \$100,000.00 to profit and loss and a credit of \$100,000.00 to capital stock.

Subsequent to the passage of the resolutions by the Directors and the Stockholders, the Auditor of Public Accounts of the State of Illinois issued a certificate approving the increase of the capital stock of the Bank to \$200,000.00. The Bank then exchanged certificates with its Shareholders on the basis of two shares of the new stock for each one share held on February 1, 1950.

A dispute arose between Robert Allen Hart and the remaindermen named in the Will as to the ownership of the 30 shares issued in exchange for the 40 shares owned by Testatrix. Robert Allen Hart claims to be the absolute owner of the 40 shares representing a

stock dividend on the original 40 shares bequeathed by the 11th clause of the Will of the Testatrix, while the remaindermen contend that the Bank by the resolutions of its Directors and Stockholders did not declare a stock dividend and that Hart is the owner of a life estate in the original 40 shares only. As the result of this dispute, plaintiff herein filed his complaint in the Circuit Court of McLean County praying that the Will of Sara M. Hart, deceased be construed and that the court determine the rights and interest of the beneficiaries under the 11th clause thereof in and to the 80 shares of Bank stock.

All of the claimants to the stock and the Bank were made parties to the suit. The defendant Robert Allen Hart filed a counterclaim praying a declaratory judgment that the 40 shares of stock issued or to be issued as a stock dividend be declared his absolute property in fee simple and that a certificate therefor be issued to him by the Bank.

By its decree the Circuit Court dismissed the complaint and found in favor of the counterclaimant on his counterclaim declaring Robert Allen Hart to be the owner in fee simple absolute of the 40 shares issued as a stock dividend on the shares owned by the Testatrix at her death. The decree further provided that the Bank reissue the original 40 shares to Hart for life with remainder in fee upon his death to the remaindermen named in the Will.

On this appeal the remaindermen, whom we will refer to as defendants, urge the court to reverse the decree on the ground that

the action of the Board of Directors as evidenced by its resolution cannot be construed as a declaration of a stock dividend for the following reasons: (1) Failure of the record to show that on December 2, 1949, the undivided profits of the Bank were sufficient to pay the proposed stock dividend. (2) Lack of authority in the Board of Directors under the Banking Act to change the capital stock of the Bank. (3) The resolutions of the Board of Directors and the Shareholders was not contemporaneous action. (4) The resolution of the Directors was no more than a recommendation for consideration of the Stockholders.

There is no merit in the first reason advanced because failure of the resolution of the Directors to show a sufficient undivided profit account to cover the proposed stock dividend has no bearing on the power of the Directors to declare a dividend. We find nothing in the banking law requiring such showing in the resolution and defendants cite no authority supporting their contention. The point urged by defendants as the second reason is not in controversy in this case. Section 12, Chapter 16 $\frac{1}{2}$, Illinois Revised Statutes 1953, provides that the Directors may submit a proposal for the increase of the capital stock to the Stockholders and such proposal was submitted by the Directors to the Shareholders of the Bank. The same observation made with reference to the first reason applies to defendants' third reason. We know of no statutory requirement that the resolutions of the Directors and the Shareholders be adopted contemporaneously. It is obvious that the recommendation of a proposed increase in capital stock must precede the action of the Shareholders thereon. The resolution of the Board of Directors

The action of the Board of Directors as mentioned in the resolution cannot be considered as a decision of the Board of Directors.

Following passage of the resolution of the Board of Directors on

December 15, 1968, the resolution was adopted by the Board of Directors

to pay the proposed stock dividend of 10% of the outstanding

Board of Directors which was adopted by the Board of Directors on

of the Board. (2) The resolution of the Board of Directors and the

shareholders was not considered as a decision of the Board of Directors

the Board of Directors on the resolution of the Board of Directors

of the shareholders.

There is no doubt that the Board of Directors is the

authority of the corporation in the absence of any other authority

which might be considered as a decision of the Board of Directors

to decide on the resolution of the Board of Directors.

The Board of Directors is the authority of the corporation in the

resolution and decision of the Board of Directors on the resolution

of the Board. The Board of Directors is the authority of the corporation

in the absence of any other authority which might be considered

as a decision of the Board of Directors.

For the purpose of the resolution of the Board of Directors on the

resolution of the Board of Directors on the resolution of the Board of Directors

Bank. The resolution of the Board of Directors on the resolution of the Board of Directors

resulted in the resolution of the Board of Directors on the resolution of the Board of Directors

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adopted correspondingly. It is not necessary to consider the resolution

of a proposed increase in capital stock which would be considered

the shareholders' interest. The resolution of the Board of Directors

adopted December 2, 1949 clearly provided for the transfer from undivided profits of an amount sufficient to cover the increase in capital stock and for the issuing of a stock dividend of one share of such capital stock to the Shareholders for each share held as of February 1, 1950. The fact that incorporated in such resolution was a recommendation to the Shareholders for an increase in the capital stock could in no way be construed as nullifying the action of the Directors declaring a stock dividend. The record likewise makes it clear that the Board of Directors and the Bank's officials complied with the directives contained in the resolution of the Shareholders.

The defendants failed to point out any failure on the part of the Bank to comply with the Statutory requirements necessary to accomplish the declaration of a stock dividend but contend that the record of the procedure followed is insufficient in not including therein certain facts which it is claimed are essential. We know of no prescribed form of resolution, which the Directors were required to employ in declaring a dividend, whether it be in cash or stock. The same may be said of the resolution of the Shareholders authorizing an increase in the capital stock. The omission in the resolutions of the fact that sufficient undivided profits were available for the proposed dividend or the failure to recite therein the details involved in the bookkeeping transactions necessitated in the distribution of the dividends are of no consequence. These facts are all

shown by the records of the Bank. The accuracy of these records has not been challenged by any evidence produced by defendants. As a matter of fact, the defendants failed to introduce any proof substantiating the points raised on this appeal.

Upon consideration of the record in this case, we are of the opinion that the Circuit Court correctly concluded that the Bank's action as evidenced by the resolutions and subsequent compliance therewith by its officers, resulted in the declaration of a stock dividend and that counterclaimant is entitled to such dividend under the 11th clause of Testatrix' Will. Therefore, the decree of the Circuit Court is affirmed.

Affirmed.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

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9 I.A. 256²¹

February Term, A. D. 1956.

General No. 10049

Agenda No. 24

John M. Hattieberg and Gibson City Community
Unit School District No. 1 of Ford, McLean
and Champaign Counties, Illinois,

Plaintiffs-Appellants,

vs.

County Board of School Trustees of Ford County,
Illinois; Elliott Community Consolidated Dist-
rict No. 205; Board of Education of Elliott
Community Consolidated District No. 205; Fisher
Community Unit School District No. 1 of
Champaign County, Illinois; Board of Education
of Fisher Community Unit School District No. 1
of Champaign County, Illinois; Ludlow Community
Consolidated District No. 142; Board of Education
of Ludlow Community Consolidated District No. 142;
Melvin-Sibley Community Unit School District No.
4 of Ford and Livingston Counties, Illinois; Board
of Education of Melvin-Sibley Community Unit
School District No. 4 of Ford and Livingston
Counties, Illinois; Paxton Community Unit School
District No. 2 of Ford, Champaign, Vermilion and
Iroquois Counties, Illinois; Board of Education of
Paxton Community Unit School District No. 2 of
Ford, Champaign, Vermilion and Iroquois Counties,
Illinois; Ludwig Hanson; Helmer Erickson; Lewis
Brown; Clifford McGuire; Russell Foster; George
Harweger; Mrs. Nobel Skonberg; Harold Shrock;
George Burton; Elmer Seibring; Raymond Kellar;
Alice Froyd Stine; Warren M. McCartan; George
Maddox; Ralph Farfield; Floyd Farmer, Jr.; Robert
Walesby; Ted Kendrick; Donald Nelson; Richard L.
Gregorson; Joseph Tomblin; Roy Forman; George
Arends; Raleigh Underwood and Charles Newman,

Defendants-Appellees.

Appeal from
Circuit Court
of Ford
County.

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REYNOLDS, J.

This is a suit for administrative review filed in the Circuit Court of Ford County, Illinois, to review the decision of the County Board of School Trustees of Ford County dividing a certain non-high school district and annexing the divided portions to adjacent school districts. The suit is brought by John H. Hatteberg, a resident of the non-high school district, and the Gibson City Community Unit School District No. 1 of Ford, McLean and Champaign Counties, Illinois. The non-high school district involved consisted of approximately 33½ sections of land in the extreme southern part of Ford County. The area is a rough rectangle approximately five miles east and west, and approximately seven miles north and south. It is bounded on the north by the Melvin-Libley Community Unit School District No. 4 of Ford and Livingston Counties; on the east by the Paxton Community Unit School District No. 2 of Ford, Champaign, Vermilion and Iroquois Counties; on the south by Fisher Community Unit School District No. 1 of Champaign County, and on the west by Gibson City Community Unit School District No. 1 of Ford, McLean and Champaign Counties.

Under the provisions of Article 4B - 25 of Chapter 122, Illinois Revised Statutes, (1953), it became the duty of the County Board of School Trustees of Ford County, to annex the said area to the district that the said County Board of School Trustees determined would best serve the interests

of the pupils in the area and would best serve the educational welfare of the pupils in the area and to which the pupils of the underlying elementary school district normally attend high school, where possible. The law provides that a public hearing be had, with due notice and this was done. After holding the public hearing the Board of School Trustees divided the area by annexing seven and one-fourth sections on the east to the Paxton School District, one and one-half sections on the north to the Melvin-Bibley School District, and the rest of the area to the Gibson City School District. The underlying elementary school district was the Elliott Consolidated School District No. 205, its territory being co-extensive with the non-high school area, except three-quarters of a section that is not joined to the main area and is adjacent to the Paxton School District. This three-quarter section is not in dispute in this suit. The Gibson City School is located about four miles west of the western boundary of the area involved. The Paxton School is located about five and one-half miles east of the eastern boundary of the area involved. The taxable areas and facilities of the schools at Paxton, Melvin-Bibley and Gibson City are comparable.

In the original suit, only the County Board of School Trustees of Ford County was made defendant. Motion was made to dismiss the suit on the ground that all proper persons were not made defendants. This motion was refused and on

motion to amend the court allowed the plaintiffs to amend their complaint and all proper parties were named defendants. The Circuit Court sustained and affirmed the decision and order of the County Board of School Trustees and from that order the plaintiffs appeal to this court.

The plaintiffs do not complain of the procedure followed by the County Board, but base their appeal on two grounds. 1. That the Board did not follow the statute in that they did not annex the area to the proper school district. 2. That the Board made no finding of fact and its decision was against the manifest weight of the evidence.

The defendants assign as cross errors that the Circuit Court was in error when it denied the board's motion to dismiss the appeal on the ground that necessary parties were not named in the appeal of the plaintiffs, and that more than 35 days had elapsed since the decision of the Board had been received by the plaintiffs. That the motions of Melvin-Sibley School District and Paxton School District and Paxton Board of Education should have been allowed for the same reasons.

The first ground assigned by the plaintiffs in their appeal is that the Board did not annex the territory in accordance with the provisions of the statute governing. There are three provisions of the statute that set out the basis for the board to determine to which school the annexation shall be made. 1. That school that will best serve

the interests of the pupils in the area. 2. That school that will best serve the educational welfare of the pupils in the area. 3. That school to which the pupils of the underlying elementary school normally attend high school. With the educational advantages and facilities of the Paxton School, the Kelvin-Sibley and the Gibson City School being about the same, the first two provisions of the statute are complied with by the decision of the Board. It might be true that some of the pupils would have to travel a longer distance to school, but with the school bus system in use by the schools of today, that is a minor consideration. The only point that might have some merit in this ground of the appeal is that the area of the non-high school district is practically co-extensive with that of the Elliott School, which under the action of the Board automatically becomes a part of the district to which the territory is annexed. It is probable that most of the children that attend the Elliott School attend the Gibson City School, it being some miles closer than that of the Paxton School. However, under the decision and order of the Board, all of this area, except the approximately seven and one-half sections on the extreme east side and the one and one-half sections on the extreme north side of the area, become part of the Gibson City School District. The testimony shows that children of the extreme eastern side of the area go to the Paxton School rather than

the Gibson City School because the Paxton School is nearer. Even so, under the decision of the Board, the great majority of the children who now attend the Elliott School will attend the Gibson City School. This court can see no merit in this ground of the appeal.

The other ground of the appeal on the part of the plaintiffs is that the Board made no finding of fact and its decision was against the manifest weight of the evidence. An examination of the Statute fails to show any requirement of a finding of fact. The Act itself says: "The county board of school trustees shall hold a hearing and annex the territory to the district that they determine will best serve the interests of the pupils in the area." The board did hold the public hearing required under the provisions of Article 11-18.1 of the Illinois School Code and did, on the 20th day of July 1954, issue an order in conformity with the decision of the Board. In its order the Board recited as follows:-
"The County Board of Trustees did hold a hearing to determine what would best serve the interests of the pupils in the area and would best serve the educational welfare of the pupils in the area and to which the pupils of the underlying elementary school district normally attend high school, where possible.

"In consideration thereof, it is Hereby Ordered, Adjudged and Decreed by the County Board of School Trustees of Ford County, Illinois, that the following division of Non-high

School Territory for annexation to the Gibson City Community Unit School District No. 1 of Ford, McLean and Champaign Counties; the Paxton Community Unit School District No. 2 of Ford, Champaign, Vermilion and Iroquois Counties, and the Melvin-Sibley Community Unit School District No. 4 of Ford and Livingston Counties, State of Illinois, be followed, to-wit: ***"

It would seem to this court that this constitutes a very definite finding of fact.

The other ground is that the decision of the Board was against the manifest weight of the evidence. In considering this point it will be necessary to examine the evidence. But in examining the evidence it must be borne in mind that the testimony of the witnesses must be examined in view of the division of the area by the Board. Only the east half of Sections 31, and the west half of Section 32 in Township 24 North, and the east half of Sections 18, 19, 30 and 31, and the west half of Sections 17, 20, 29 and 32 in Township 23 North, were annexed to Paxton. The evidence shows that twelve witnesses, living for the most part in the area annexed to Paxton School, testified before the board and gave their reasons why they wanted the territory annexed to the Paxton School. Only portions of Sections 26 and 27, Township 24 North, were annexed to the Melvin-Sibley School. There were two witnesses before the Board living or owning land in the area annexed to the Melvin-Sibley School who

testified and gave their reasons why they wanted the area annexed to the Melvin-Sibley School. There were eight witnesses, all of whom live in the area annexed to the Gibson City School, who testified and gave their reasons why they wanted to have the territory annexed to the Gibson City School. In addition the Board had before it in the form of exhibits the valuations and rates of the Ford County Schools, March 1954; data on the non-high school district in question; the enrollment record of students from the non-high school area in the schools at Paxton, Gibson City and Melvin, for a number of years; and the record of students that had gone from the Elliott School to the Paxton or Gibson City schools since 1948, together with other evidence.

It is true that the finding and action of an administrative body such as this Board of School Trustees must rest upon sufficient evidence to support such finding and action. State Public Utilities Commission ex rel. Chicago Board of Trade v. Toledo, St. Louis and Western Railroad Co., 286 Ill. 582. But it is equally true that it is not within the province of the court to disturb the findings of fact made by an administrative agency unless manifestly against the weight of the evidence. Illinois Central Railroad Co. v. Franklin County, 387 Ill. 301; Liberty Foundries Co. v. Industrial Commission, 373 Ill. 146; Brotherhood of Railroad Trainmen v. Elgin, Joliet and Eastern Railway

Co., 374 Ill. 60; Drezner v. Civil Service Commission, 398 Ill. 219. And our courts have held that the Administrative Review Act provides that the findings and conclusions of the administrative agency on questions of fact shall be held prima facie true and correct. Krachock v. Department of Revenue, 403 Ill. 148; Curtis v. State Police Merit Board, 349 Ill. App. 448; Nolting v. Civil Service Commission, 7 Ill. App. 2nd 147, 158.

In a proceeding under the Administrative Review Act, it is not the province of a court to disturb the findings of fact made by an administrative agency unless it is manifestly against the weight of the evidence. The court does not have the right to reweigh the evidence nor to make its own independent determination of the facts. Oratowski v. Civil Service Commission, 3 Ill. App. 2nd 551; Harrison v. Civil Service Commission, 1 Ill. 2nd 137. The only power of a reviewing court is to consider the record to determine if the findings are against, or are supported by the manifest weight of the evidence. Secaur v. Civil Service Commission, 408 Ill. 197; Brown Shoe Company v. Gordon, 405 Ill. 384.

It is inevitable in a case of this kind that some inequities will exist. It is even more inevitable that there will be some dissatisfaction. The Board of School Trustees is a representative body, elected by the people of the county.

They should represent the best minds of the county on educational matters. This court must presume that their action was the result of their best judgment in the matter. Under the law their decision and action on the question of annexation of the area involved must be held prima facie true and correct, unless such decision and action is manifestly contrary to the weight of the evidence before them.

In the case of Community Consol. School Dist. v. County Board, 7 Ill. App. 2d 98, which was a case involving detachment of territory from one school district and annexing it to another school district, the court in that case after holding that the fact that the change would result in a higher tax rate would not render the change arbitrary or unreasonable, said:

"The County Board of School Trustees saw the witnesses and received the report from the County Superintendent of Schools as to the school needs and conditions, the ability of the districts affected to meet the standards of recognition as prescribed by the Superintendent of Public Instruction and as to whether it would be to the best interests of the schools of the area and the educational welfare of the pupils that the territory be detached from District No. 201 and annexed to District No. 230. With all of this evidence before them, the County Board of School Trustees exercised its discretion and granted the prayer of the petition. In discretionary

matters, the court will not substitute its judgment for that of the administrative agency. *People ex rel. Loughry v. Board of Education of Chicago*, 342 Ill. App. 610. Where evidence is conflicting the finding of the administrative agency will not be disturbed, as it is only where its decision is without substantial foundation in the record or is manifestly against the weight of the evidence that such decision will be set aside. *Town of Cicero v. Industrial Commission*, 404 Ill. 487; *Crepps v. Industrial Commission*, 402 Ill. 636."

This court cannot say that the Board's action was arbitrary or without foundation. On the contrary, from an examination of the whole record it appears there is ample evidence to support the decision and action of the Board of School Trustees.

It is unnecessary to pass on the cross errors assigned. However, there is serious doubt that the Circuit Court had jurisdiction in the matter in the light of the decisions concerning the Administrative Review Act. The record shows that at the public hearing of the County Board of School Trustees of Ford County, held July 19th, 1954, Mr. Jarnahan, attorney for Gibson City Community Unit School District No. 1 and Elliott Community Consolidated School District No. 204 entered an appearance for those schools. Mr. Hummel, attorney for Paxton Community Unit School District No. 2 and Melvin-Sibley Community Unit School District No. 4 entered an appearance for those two schools. These school districts

were parties of record at the hearing of the Board. Yet they were not made defendants in the suit brought to review the action of the Board in the Circuit Court within the time specified in the Administrative Review Act, namely 35 days from the date that a copy of the decision sought to be reviewed was served upon the party affected thereby. The case of Winston v. Zoning Board of Appeals, 407 Ill. 588, was a case where a motion to dismiss was filed asserting that the complaint had failed to include as defendants five persons who were parties of record to the proceedings before the zoning board. The Court said: "Section 8 of the Administrative Review Act (Ill. Rev. Stat. 1949, Chap. 110, par. 271,) provides that 'In any action to review any final decision of an administrative agency, the administrative agency and all persons, other than the plaintiff, who were parties of record to the proceedings before the administrative agency shall be made defendants'. The requirement that all adverse parties of record to the administrative proceeding shall be made defendants on review is mandatory and specific, and admits of no modification. The act being an innovation and departure from the common law, the procedures it establishes must be pursued in order to justify its application. (Krachock v. Department of Revenue, 403 Ill. 148). In addition to not stating a cause of action, the complaint was also fatally defective in failing to include as defendants all persons

other than the plaintiffs who were parties of record to the administrative proceeding." This law was followed in the case of Cuny v. Annunzio, 411 Ill. 613.

For the reasons stated the order and judgment of the Circuit Court is affirmed.

affirmed.

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STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
October Term, A. D. 1955

Term No. 55-0-5

Agenda No. 18

BOARD OF EDUCATION OF COMMUNITY)
CONSOLIDATED SCHOOL DISTRICT)
NO. 110, ST. CLAIR COUNTY,)
ILLINOIS,)
Plaintiff-Appellee,)
vs.)
S. T. PABST, Doing Business as)
S. T. PABST AND ASSOCIATES,)
Defendant-Appellant,)
CARDINAL CONSTRUCTION COMPANY,)
a Corporation,)
Defendant.)

9 I.A.^{2d} 388

Appeal from
the
Circuit Court
of
St. Clair
County.

CULBERTSON, J.

This is an appeal from the judgment of the Circuit Court of St. Clair County in favor of Plaintiff, BOARD OF EDUCATION OF COMMUNITY CONSOLIDATED SCHOOL DISTRICT NO. 110, ST. CLAIR COUNTY, ILLINOIS, and as against Defendant, S. T. PABST, Doing Business as S. T. PABST AND ASSOCIATES, in the sum of \$3588.00. Defendant is an architect who was joined in an action by plaintiff Board of Education for breach of contract in designing, planning, and drawing the specifications for a

sewage disposal system to be installed in a school in the School District of plaintiff. The Contracting Company which actually built the sewage disposal system was also joined as a party defendant, and judgment was entered in favor of such Contracting Company when the evidence disclosed that the Contractor carried out the architect's specifications in building the sewage disposal system.

On appeal in this Court the plaintiff Board of Education likewise moves to dismiss the appeal on the ground that defendant failed to appeal from the final order of the Trial Court, and directs our attention to the fact that defendant's notice of appeal specifically seeks an appeal only from a judgment order of the Trial Court entered on September 28, 1954. On December 3, 1954 the Trial Court, after argument of defendant's motion to vacate and set aside the judgment of September 28, 1954, modified and set aside such judgment and entered a final judgment which severed the counter-claim of defendant from the cause and set the counter-claim for separate trial. The first order had specifically found that since no evidence was offered to substantiate the counter-claim, the counter-claim was dismissed. In other respects the order of December 3, 1954 was the same as the order of September 28, 1954. The notice of appeal does not seek relief from the final order of the Trial Court, viz: the judgment of

December 3, 1954. Courts of Appeal have held in other cases that an appeal can only be taken from a final order or decree of the Trial Court. In the case of BRAUER SUPPLY CO. vs. TRUCK CO., 383 Ill. 569, 574, it was pointed out that right of appeal is purely statutory, and that such right of appeal is limited to final judgments, orders, or decrees. The final order of December 3, 1954 would have been the order from which time for appeal is calculated. Such final order vacates and supercedes the first order.

The motion to dismiss the appeal is, therefore, properly presented and the appeal will be dismissed accordingly.

Appeal dismissed.

BARDENS, P. J., and SCHEINEMAN, J., concur.

Publish Abstract Only.

FILED

FEB 1 1956

David J. Mallett

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS



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46645

MATTIE DODDS,

Appellee,

v.

CHICAGO TRANSIT AUTHORITY,
a Municipal Corporation,
and RICHARD BROUILLETTE,
Appellants.

9 T. A. 2d 388

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

MR. PRESIDING JUSTICE McCORMICK DELIVERED THE OPINION
OF THE COURT.

Plaintiff brought an action against the Chicago Transit Authority and Richard Brouillette for personal injuries sustained on May 2, 1953 when a bus of the defendant Chicago Transit Authority in which plaintiff was a passenger was struck by an automobile driven by Brouillette. A jury trial resulted in a verdict and judgment on September 23, 1954 against both defendants in the sum of \$35,000. Motions for judgment notwithstanding the verdict and for new trial filed by each defendant were overruled by the trial court. Separate appeals from the judgment were taken to this court.

The defendant Chicago Transit Authority, hereafter referred to as CTA, here contends that the trial court erred in failing to direct a verdict for it at the close of plaintiff's evidence as well as at the close of all the evidence; that the court erred in the giving and refusal of instructions; and that the verdict was against the manifest weight of the evidence and was excessive. Defendant Brouillette contends that the trial court erred in failing to withdraw a juror on Brouillette's motion after

the court had sustained his objection to an alleged prejudicial question asked by the plaintiff's counsel and that there was error in the giving and refusal of certain instructions.

It would seem scarcely necessary to restate that we will not, on review in this court, consider matter which has not been raised in the lower court in the motion for new trial, and that we will not consider any ruling of the trial court in giving or refusing instructions unless the instructions involved are specifically pointed out in the motion for a new trial. Rudolph v. City of Chicago, 2 Ill. App. 2d 370; Cascio v. Bishop Sewer & Water Co., 2 Ill. App. 2d 378; Pajak v. Mamsch, 338 Ill. App. 337; Krug v. Armour & Co., 335 Ill. App. 222; Chism v. Decatur Newspapers, Inc., 340 Ill. App. 42; Weinrob v. Heintz, 346 Ill. App. 30. All alleged errors not raised in the trial court by motion for new trial are waived, and in the instant case we will only consider or refer to matters properly so raised.

The collision occurred when the CTA bus, westbound on 111th street, was struck in the southbound lane of Halsted street by an auto driven by Brouillette. At this intersection Halsted street is a divided highway with two lanes, one for northerly and one for southerly traffic, separated by a parkway approximately 15 feet in width. The traffic at the intersection was regulated by four stop and go lights located respectively at the four corners

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of the intersection. The traffic signals on the northwest and southeast corners of the intersection were affixed to a street lamppost and were of the type displaying lights only in a northerly and southerly direction. The traffic signals on the northeast and southwest corners of the intersection were of the pedestal type and displayed lights only in an easterly and westerly direction. The traffic signals on each of the four corners were constructed with visors encircling the actual lens of the light, so as to further direct and concentrate the light only in the longitudinal direction of the traffic signal. Such north and south traffic signals had no apertures or lenses visible to east and westbound traffic. The sequence of change of the traffic control lights on the northwest and southeast corners of the intersection was from green to amber to red, and from red back to green. Traffic on Halsted street was given the green light for 25 seconds, and on 111th street for 30 seconds. The amber light would be on for three or four seconds, while the green was still on. Both the green and amber lights go completely off and are replaced by red.

The CTA earnestly contends that the driver of the bus in which the plaintiff was a passenger was not negligent, and that the sole cause of the accident was the negligence of Brouillette.

The plaintiff did not see the condition of the lights at the time the bus entered the intersection. The CTA offered the testimony of the driver of the bus and

four witnesses. The driver of the bus testified that while proceeding westbound on 111th street he had stopped at Halsted street for a red light; that when the light turned green he proceeded to cross Halsted street; that Halsted street is 65 feet wide, with two 25-foot traffic lanes and a 15-foot center parkway; that when he was about 10 feet west of the east curb line of Halsted street he saw Brouillette's car for the first time about 300 to 400 feet north of 111th street, that as he crossed the parkway the light was still green in his favor and he again saw the car about 100 or 150 feet north; that at no time could he estimate or judge the speed of the automobile, but that the last time he looked at it he knew it "was coming fast"; that he then "not looking again" to the north proceeded across the southbound traffic lane of Halsted without applying his brakes, looking straight ahead; that Brouillette's car "came from nowhere" and hit the middle of the bus; that the bus was traveling at 10 to 12 miles an hour.

Witness Jordan, a passenger on the bus sitting on the left side about halfway back, testified that he saw the light at the northeast corner change to green when the bus started; that at that time he could see the lights on all four corners, half being red and half green; and that he saw Brouillette's car coming at a fast speed.

Witness Allen, Jr., a passenger who was seated on

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the right side of the bus behind the plaintiff, testified that while he could see the light at the northeast corner he was watching the one on the west side, which he saw change to green when the bus started moving; that before the bus started he saw Brouillette's car at least a block away, coming at a speed of about 60 miles an hour, and that the car did not slow up until it collided with the bus.

Witness Green, a passenger, testified that he was asleep prior to the time of the accident; that he did not see the lights, and did not know whether or not the bus stopped before it entered Halsted street.

Witness Dixon, a passenger seated on the right rear seat of the bus, testified that the bus stopped at Halsted street; that he was looking at the light on the northeast corner of Halsted street; that the light was green when the bus started up across Halsted; that when he first saw the car the bus was a little past the parkway and the car was 100 feet or so away; that he did not know the speed of the automobile.

Witness Allen, Sr., a passenger in the bus who was seated three seats in back of the driver on the left side, testified that the bus stopped at Halsted street and waited until the light turned green; that he was looking northwest and at the light on the northeast corner; that he saw Brouillette's car immediately before the collision coming at a "tremendous speed."

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1. The first step is to identify the problem or goal. This involves understanding the current situation and what needs to be achieved.

Brouillette testified that he was familiar with the intersection at 111th and Halsted streets; that he was approximately 200 feet north of the intersection when he first saw the westbound CTA bus stopped at the east corner of the intersection east of the east curb line; that at that time he was driving in the southbound lane of Halsted street next to the west curb and at that time the traffic signal was green for southbound traffic.

The evidence shows that the speed limit on Halsted street was 35 miles an hour. Brouillette in his testimony admitted that he was going 35 to 40 miles an hour and testified that when he was 100 feet from the intersection the light on the northwest corner changed to amber; that the bus, which was already proceeding across the street, had slowed down at the parkway and that he then increased his speed and was traveling at 35 miles an hour; that his car and brakes were in perfect condition and that he put his brakes on 40 to 50 feet north of the point of impact. The testimony of a police officer was that 60-foot skid marks were left by the car. Brouillette's car crashed into the middle of the bus, knocking the bus sideways and causing his car to burst into flames. The testimony of Allen, Sr., a witness for the CTA, was that Brouillette was coming at a speed of 60 miles an hour a block away and just before the bus started on the green light and that he did not reduce his speed until the impact. Other witnesses stated that he was coming at a "tremendous

speed," a "high speed," a "fast speed." The CTA bus, when it reached the parkway separating the north and southbound traffic lanes of Halsted street, according to Brouillette's testimony, had slowed up. The light being in its favor, it started to proceed across the 25-foot southbound traffic lane, with the driver looking straight ahead and making no effort to stop after he had observed Brouillette's car approaching him 100 feet away at a high rate of speed. He did not look at the car again until the impact. The bus driver was not too clear in his testimony as to when he first saw the lights of Brouillette's car. The credibility to be given to the testimony of the witnesses for the CTA with reference to the bus entering the intersection on the green light depended upon the question as to whether or not from the testimony as to their position in the bus, considered together with other oral testimony as to the position of the bus and the lights as well as the pictures and diagrams of lights at the intersection, they were able to see what they claimed to have seen. The driver testified that he was watching the light on the northwest corner and that he started across when that light turned green. Undoubtedly he meant, and we will so assume, that he started when that light turned red, which normally would make the light on the northeast corner green in his favor. However the fact remains that from the evidence all he could see would be a reflection of the light on the corner at which he testified he was looking.

The CTA contends that the trial court was in error in overruling its motion for a directed verdict at the close of the plaintiff's evidence. That question is not before us for consideration since by introduction of evidence it waived any objection that it might have. Goldberg v. Capitol Freight Lines, Ltd., 314 Ill. App. 347.

The CTA also urges that the court erred in overruling its motion to direct a verdict in its favor at the close of all the evidence, and contends that there was no evidence in the record that it was negligent. Here there was no question that the plaintiff at the time of the occurrence was exercising due care for her own safety and was injured because of a collision between the CTA bus and the car driven by Brouillette. Each defendant seeks to place the blame on the other. In order that the court at the close of all the evidence could sustain a motion for directed verdict in favor of either of the defendants it must appear that from all the evidence and all the inferences that may reasonably be drawn therefrom, considered most favorably to the plaintiff, there was a failure on the part of the plaintiff to prove one or more of the necessary elements of her case. Andres v. Green, 7 Ill. App. 375; Heideman v. Kelsey, 414 Ill. 453.

It is a fundamental rule of law that a common carrier owes to its passengers the highest decree of care consistent with the practical operation of its business. Krueger v. Richardson, 326 Ill. App. 205. It is also a

fundamental rule of law that even a person upon whom is imposed the duty of only exercising ordinary care cannot blindly rely on traffic signals and proceed into an intersection when the signal is in his favor without a care or thought for the safety of others who may be in his path, and this is particularly true when he apprehends or with reasonable diligence could have apprehended that this conduct will probably result in an accident. Byrne et al. v. O. G. Schultz, Inc., 306 Pa. 427, 160 A. 125; Adams v. Berkun, 2 N. Y. S. 2d 98. Whether or not the conduct of the CTA's driver constituted negligence under the evidence presented in this case was a factual question for the jury.

In support of its motion for directed verdict the CTA also argues that even if a defendant is negligent he does not thereby become liable unless his negligence is itself the proximate cause of the plaintiff's injury, and it contends that even if the action of the driver of the CTA bus constituted negligence; it merely created a condition, and the proximate cause of the injury suffered by the plaintiff was the negligence of Brouillette, citing Illinois Cent. R.R. Co. v. Oswald, 338 Ill. 270, in support of its contention. That case is not applicable to the factual situation before us. It is well established that there may be two or more concurrent and directly co-operative and efficient proximate causes of an injury. The rule is stated in Restatement of the Law of Torts, sec. 439:

"If the effects of the actor's negligent conduct actively and continuously operate to bring about harm to another, the fact that the active and substantially simultaneous operation of the effects of a third person's innocent, tortious or criminal act is also a substantial factor in bringing about the harm does not protect the actor from liability."

Christy v. Elliott, 216 Ill. 31, 47-48; Housley v. Noblett, 234 Ill. App. 59; Libby, McNeill & Libby v. Illinois Dist. Tele. Co., 294 Ill. App. 93, 103-104. It is also well established that where the first cause has become static, the test is as to whether the first wrongdoer at the time he acted might have reasonably anticipated the intervening act as a natural and probable result of his negligence. Ney v. Yellow Cab Co., 2 Ill. 2d 74; Neering v. I. C. R. R. Co., 383 Ill. 366; Merlo v. Public Service Co., 381 Ill. 300; Seith v. Commonwealth Electric Co., 241 Ill. 252. The admitted fact that the CTA driver under circumstances such as are shown in the instant case proceeded blindly into the intersection in the face of an oncoming car approaching the intersection at a high rate of speed was a matter which should properly have been considered by a jury in determining whether or not his conduct was negligent and a proximate cause of the injury suffered by the plaintiff. In fact similar conduct has even been held to be a basis for a finding of willful and wanton conduct. Schneiderman v. Interstate Transit Lines, 394 Ill. 569. The bus driver under such state of facts would have no right to rely on the assumption that Brouillette would follow the law, obey the light and stop before entering the intersection. He was not relieved from

[illegible][illegible]

Established that there are no known victims of the 1947-1948, 1949-1950, 1951-1952, 1953-1954, 1955-1956, 1957-1958, 1959-1960, 1961-1962, 1963-1964, 1965-1966, 1967-1968, 1969-1970, 1971-1972, 1973-1974, 1975-1976, 1977-1978, 1979-1980, 1981-1982, 1983-1984, 1985-1986, 1987-1988, 1989-1990, 1991-1992, 1993-1994, 1995-1996, 1997-1998, 1999-2000, 2001-2002, 2003-2004, 2005-2006, 2007-2008, 2009-2010, 2011-2012, 2013-2014, 2015-2016, 2017-2018, 2019-2020, 2021-2022, 2023-2024, 2025-2026, 2027-2028, 2029-2030, 2031-2032, 2033-2034, 2035-2036, 2037-2038, 2039-2040, 2041-2042, 2043-2044, 2045-2046, 2047-2048, 2049-2050, 2051-2052, 2053-2054, 2055-2056, 2057-2058, 2059-2060, 2061-2062, 2063-2064, 2065-2066, 2067-2068, 2069-2070, 2071-2072, 2073-2074, 2075-2076, 2077-2078, 2079-2080, 2081-2082, 2083-2084, 2085-2086, 2087-2088, 2089-2090, 2091-2092, 2093-2094, 2095-2096, 2097-2098, 2099-2100, 2101-2102, 2103-2104, 2105-2106, 2107-2108, 2109-2110, 2111-2112, 2113-2114, 2115-2116, 2117-2118, 2119-2120, 2121-2122, 2123-2124, 2125-2126, 2127-2128, 2129-2130, 2131-2132, 2133-2134, 2135-2136, 2137-2138, 2139-2140, 2141-2142, 2143-2144, 2145-2146, 2147-2148, 2149-2150, 2151-2152, 2153-2154, 2155-2156, 2157-2158, 2159-2160, 2161-2162, 2163-2164, 2165-2166, 2167-2168, 2169-2170, 2171-2172, 2173-2174, 2175-2176, 2177-2178, 2179-2180, 2181-2182, 2183-2184, 2185-2186, 2187-2188, 2189-2190, 2191-2192, 2193-2194, 2195-2196, 2197-2198, 2199-2200, 2201-2202, 2203-2204, 2205-2206, 2207-2208, 2209-2210, 2211-2212, 2213-2214, 2215-2216, 2217-2218, 2219-2220, 2221-2222, 2223-2224, 2225-2226, 2227-2228, 2229-2230, 2231-2232, 2233-2234, 2235-2236, 2237-2238, 2239-2240, 2241-2242, 2243-2244, 2245-2246, 2247-2248, 2249-2250, 2251-2252, 2253-2254, 2255-2256, 2257-2258, 2259-2260, 2261-2262, 2263-2264, 2265-2266, 2267-2268, 2269-2270, 2271-2272, 2273-2274, 2275-2276, 2277-2278, 2279-2280, 2281-2282, 2283-2284, 2285-2286, 2287-2288, 2289-2290, 2291-2292, 2293-2294, 2295-2296, 2297-2298, 2299-2300, 2301-2302, 2303-2304, 2305-2306, 2307-2308, 2309-2310, 2311-2312, 2313-2314, 2315-2316, 2317-2318, 2319-2320, 2321-2322, 2323-2324, 2325-2326, 2327-2328, 2329-2330, 2331-2332, 2333-2334, 2335-2336, 2337-2338, 2339-2340, 2341-2342, 2343-2344, 2345-2346, 2347-2348, 2349-2350, 2351-2352, 2353-2354, 2355-2356, 2357-2358, 2359-2360, 2361-2362, 2363-2364, 2365-2366, 2367-2368, 2369-2370, 2371-2372, 2373-2374, 2375-2376, 2377-2378, 2379-2380, 2381-2382, 2383-2384, 2385-2386, 2387-2388, 2389-2390, 2391-2392, 2393-2394, 2395-2396, 2397-2398, 2399-2400, 2401-2402, 2403-2404, 2405-2406, 2407-2408, 2409-2410, 2411-2412, 2413-2414, 2415-2416, 2417-2418, 2419-2420, 2421-2422, 2423-2424, 2425-2426, 2427-2428, 2429-2430, 2431-2432, 2433-2434, 2435-2436, 2437-2438, 2439-2440, 2441-2442, 2443-2444, 2445-2446, 2447-2448, 2449-2450, 2451-2452, 2453-2454, 2455-2456, 2457-2458, 2459-2460, 2461-2462, 2463-2464, 2465-2466, 2467-2468, 2469-2470, 2471-2472, 2473-2474, 2475-2476, 2477-2478, 2479-2480, 2481-2482, 2483-2484, 2485-2486, 2487-2488, 2489-2490, 2491-2492, 2493-2494, 2495-2496, 2497-2498, 2499-2500, 2501-2502, 2503-2504, 2505-2506, 2507-2508, 2509-2510, 2511-2512, 2513-2514, 2515-2516, 2517-2518, 2519-2520, 2521-2522, 2523-2524, 2525-2526, 2527-2528, 2529-2530, 2531-2532, 2533-2534, 2535-2536, 2537-2538, 2539-2540, 2541-2542, 2543-2544, 2545-2546, 2547-2548, 2549-2550, 2551-2552, 2553-2554, 2555-2556, 2557-2558, 2559-2560, 2561-2562, 2563-2564, 2565-2566, 2567-2568, 2569-2570, 2571-2572, 2573-2574, 2575-2576, 2577-2578, 2579-2580, 2581-2582, 2583-2584, 2585-2586, 2587-2588, 2589-2590, 2591-2592, 2593-2594, 2595-2596, 2597-2598, 2599-2600, 2601-2602, 2603-2604, 2605-2606, 2607-2608, 2609-2610, 2611-2612, 2613-2614, 2615-2616, 2617-2618, 2619-2620, 2621-2622, 2623-2624, 2625-2626, 2627-2628, 2629-2630, 2631-2632, 2633-2634, 2635-2636, 2637-2638, 2639-2640, 2641-2642, 2643-2644, 2645-2646, 2647-2648, 2649-2650, 2651-2652, 2653-2654, 2655-2656, 2657-2658, 2659-2660, 2661-2662, 2663-2664, 2665-2666, 2667-2668, 2669-2670, 2671-2672, 2673-2674, 2675-2676, 2677-2678, 2679-2680, 2681-2682, 2683-2684, 2685-2686, 2687-2688, 26

and the fact that the Commission has not yet received any information from the Commission regarding the results of the investigation.

1. The Commission did not find any other persons who were involved in the activities of the Commission.

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admitted that the CIA driver who shot him was hostile
as he shows in the fact he was screaming "let me
go" and "let me go" and "let me go" and "let me go"

information in the following way: The information is first
input into a computer, which then processes it and
produces a report. The report is then used to make
decisions about the future. This is the basic
idea of the system.

studies, at least a few conditions need even stronger clinical
evidence to be considered as demonstrably having value.

It is not clearly understood whether or not the
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Transcripts would follow in January, with the final report due by March 1967.

SECRET
NO FOREIGN DISSEM

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the duty he owed to the passengers of exercising a high degree of care for their safety. The intervention of independent, concurrent or intervening forces will not break causal connection if the intervention of such forces was, itself, probable or foreseeable. Johnston v. City of East Moline, 405 Ill. 460; Ney v. Yellow Cab Co., supra. Here the injury resulted from practically simultaneous acts on the part of both the CTA and Brouillette. The question as to whether the proximate cause of the injury to the plaintiff was the joint negligence of the CTA and Brouillette or was the result of the negligence of Brouillette alone was a question of fact for the determination of the jury. The trial court properly overruled the motion for a directed verdict on the part of the CTA at the close of all the evidence.

The defendant CTA also contends that the verdict of the jury was against the manifest weight of the evidence. The evidence which we have adverted to together with other evidence in the record furnished a substantial basis upon which the jury was justified in finding as they did. "A verdict will not be set aside merely because the jury could have found differently or because judges feel that other conclusions would be more reasonable. Lindroth v. Walgreen Co., 407 Ill. 121. In the trial of a law suit, questions of one's due care, another party's alleged negligence and the proximate cause of such injured party's injuries and damages are pre-eminently questions of fact for a jury's determination. Under

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our system of jurisprudence, jury determinations can be set aside only when a court of review, or a trial court upon proper motion, is clearly satisfied that they were occasioned by passion or prejudice or found to be wholly unwarranted from the manifest weight of the evidence." Kahn v. James Burton Co., 5 Ill. 2d 614.

During the examination of Brouillette, who was called as an adverse witness by the plaintiff, the following proceedings took place. Counsel for the plaintiff asked the following question: "Did you ever admit to anyone that you ran a red light, Mr. Brouillette?" Answer: "No, sir, I didn't. I didn't run any red light." After counsel had stated he had no further questions to ask, counsel for Brouillette objected to the question. The court then inquired as to whether counsel for the plaintiff had any evidence on the question, and counsel stated that he did not. The court then stated: "The propriety of putting that question--it is objectionable unless you would have some evidence to produce later that such a statement was made or that such an admission was made." Sustaining the objection, the court instructed the jury to disregard the question and answer. Counsel made an oral motion to withdraw a juror and reserved the right to subsequently file a written motion. After the CTA had rested its defense, counsel for Brouillette stated: "Defendant Brouillette will adopt the testimony he gave when he was called as an adverse witness under section 60 as part of his case and will rest and object at this time to any further cross-examination."

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On September 21st, at the close of plaintiff's evidence Brouillette filed a written motion for a directed verdict and with it a motion to withdraw a juror and declare a mistrial, which motions were denied by the court. Subsequently he presented a motion for judgment notwithstanding the verdict and in the alternative a motion for a new trial, in which he urged that the court erred in denying his motion to withdraw a juror and declare a mistrial.

Brouillette now contends that the court erred in failing to grant his motion for a mistrial and that the question asked was so objectionable that even though the court instructed the jury to disregard it he was still deprived of a fair trial. Brouillette was a party to the suit and at the time of the occurrence he was being examined by the plaintiff under section 60 of the Practice Act, which provides that an adverse party "may be examined as if under cross-examination." A greater latitude is permitted in cross-examination of a party in interest than in that of an ordinary witness. Felsenthal Co. v. North. Assur. Co., 284 Ill. 343, 351. If the question objected to had been answered in the affirmative, the answer would have had substantive value and would not be merely impeaching. It would have been an admission on the part of the defendant. It would not have been conclusive, but it could properly have been considered by the jury. In questioning a party to the suit in an attempt to bring out an admission it is not necessary to lay a foundation as in the case of an ordinary witness (Johnson

v. Peterson, 166 Ill. App. 404), and the decisions have allowed counsel attempting to get in evidence an admission from a party a very broad latitude (Chicago City Ry. Co. v. Canevin, 72 Ill. App. 81; Green v. Jennings, 184 Ill. App. 340). However, we feel that asking a question such as here propounded when counsel had, as he admits, nothing, not even suspicion, upon which to base it, was improper; and the trial court, as soon as it was brought to its attention, properly sustained the tardy objection and instructed the jury to disregard the question and answer. The question as to the latitude of cross-examination is within the sound discretion of the court. Here the court acted promptly as soon as the objection was made. The question was asked defendant whether or not he had previously stated he had run a red light. His answer was in the negative. The court, having obtained from counsel asking the question the admission that he had nothing on which to base the question, sustained the objection and instructed the jury to disregard both question and answer. Considering the previous testimony of Brouillette, it would be a strained concept of the process of jury deliberation to conclude that an average jury would be so impressed and prejudiced by the question and negative answer, in spite of the fact that the court had instructed them to disregard them, that they would draw therefrom an inference that Brouillette had entered the intersection on a red light. Such a construction is not in accord with common experience; and in any case there was

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evidence to sustain a finding of the jury that Brouillette was negligent. Under all the facts and circumstances in the case the court did not err in denying the motion of the defendant to withdraw a juror and declare a mistrial, and no injury thereby resulted to the defendant Brouillette.

The CTA contends that the trial court erred in giving the following instruction:

"You are instructed that it is the duty of a common carrier to do all that human care, diligence and foresight can reasonably do under the circumstances and in view of the character and the mode of conveyance adopted, consistent with the practical prosecution of its business, to guard against accidents and consequential injuries, and if it neglects so to do it is to be held responsible for all consequences which directly and proximately flow from such neglect (provided such neglect and consequence are alleged in the complaint and are proved by a preponderance or greater weight of the evidence); that while the carrier is not an insurer of the absolute safety of the passenger, it does, however, in legal contemplation, undertake to exercise the highest degree of care to secure the safety of the passenger, under the circumstances and in view of the character and the mode of conveyance adopted, consistent with the practical prosecution of its business, and is responsible for any neglect which directly and proximately causes injury to the passenger (provided such neglect and injury are alleged in the complaint and are established by a preponderance or greater weight of the evidence), if the passenger is at the time of the injury exercising ordinary care for her own safety."

An instruction substantially similar to the instant instruction was approved in Chicago City Ry. Co. v. Shreve, 226 Ill. 530. This was done even though the instruction in that case did not limit the degree of care required of the carrier to such care as is consistent with the practical operation of its streetcar line. In the instruction before us such limitation is made. In the Shreve case the court calls attention to the fact that the instruction was not

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peremptory. The instruction here under consideration was not a peremptory instruction and it correctly stated the law.

The CTA in its brief attempts to tie up this instruction with plaintiff's instruction 14, which was a peremptory instruction, but in its motion for new trial it made no objection to instruction 14 and hence that instruction is not before us for consideration. The CTA in its brief argues that the objection to instruction 14 was properly raised by its assignment of error 25 in the motion for new trial, as follows: "There was error in instructing the jury concerning the care required of the plaintiff." It contends that as this was the only instruction which mentioned the care of plaintiff it must have been the instruction to which it was objecting, although the error which it here argues has no reference to the care required of the plaintiff. The purpose of requiring the motion for new trial to set forth with particularity the instructions objected to is to prevent "the moving party from hiding behind a general objection in the trial court and for the first time raising with particularity in the Appellate Court an objection to misleading or erroneous instructions." Rudolph v. City of Chicago, 2 Ill. App. 2d 370. A court of review is not required to search the record in order to find grounds for reversal. People ex rel. Rose v. Craig, 404 Ill. 505.

Defendant Brouillette objects to the refusal of the trial court to give an instruction tendered by him in the language of the statute governing intersections controlled

by traffic signals, and particularly to the following portion of the instruction:

"Yellow or 'Caution' when shown following the green or 'Go' signal.

"1. Vehicular traffic facing the signal shall stop before entering the nearest crosswalk at the intersection, but if such stop cannot be made in safety, a vehicle may be driven cautiously through the intersection." (Emphasis added by Brouillette in his brief.)

An instruction not based upon the evidence or upon the issues raised by the evidence should not be given. Magill v. George, 347 Ill. App. 6. Counsel contends, earnestly, that there was evidence in the record to the effect that Brouillette had entered the intersection on the amber light. But taking that to be true, the further evidence that when he was 100 feet from the intersection at the time when the light changed to amber, when the bus was already proceeding across the street and had slowed down at the parkway, he increased his speed and proceeded through the intersection and was unable to stop his car to avoid impact, could as a matter of law permit an inference to be drawn that he was not exercising caution. There is nothing in the record to show caution on his part. The instruction was properly refused. "Instructions must be based upon the issues raised by the evidence and it is reversible error to give instructions where there is no evidence upon which the instruction can be based. Rosenkrans v. Barber, 115 Ill. 331; Russell v. Consolidated Forwarding Corp., Inc., 327 Ill. App. 204." Magill v. George, 347 Ill. App. 6.

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In his motion for new trial Brouillette objected to the giving of plaintiff's instruction 14, but he does not argue the error in his brief and we cannot consider it.

The CTA further contends that the verdict was excessive. The evidence was that the plaintiff, who was aged 61 and was in good health before the accident, sustained fractures of the vertebrae and ribs. She also sustained traumatic neuritis of the nerve roots above and below the area of the lumbar fracture, sprain of the cervical vertebra imposed upon a previously existing osteoarthritis; a possible subluxation of the third cervical vertebra which would show improvement and post-concussional syndrome not attended by neurological findings; neurological involvement might or could be permanent. The fracture of the lumbar vertebra would be permanent, the cervical region might get well, remain the same, or get worse. The treatment recommended was to wear a back brace, use of physiotherapy and analgesics. She had suffered considerable pain and at the time of the trial was still suffering considerable pain, and had to sleep on a mattress which was supported by a board. There was testimony that she would not be able to return in the future to the type of work she engaged in prior to the accident. The plaintiff had been employed doing steam table work and averaged \$250 a month. No medical testimony was introduced by either defendant. We have carefully examined the evidence in this case and we do not think ^{that} the damages awarded to the plaintiff were so excessive as to

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indicate passion or prejudice on the part of the jury. There was sufficient evidence in the record to support the jury's verdict. As we have held repeatedly, a court under such circumstances will not substitute its judgment for the judgment of the jury. Garner v. Burns Mid-Town, Inc., 346 Ill. App. 162; Levanti v. Dorris, 343 Ill. App. 355; Gorczynski v. Nugent, 335 Ill. App. 63; Mueth v. Jaska, 302 Ill. App. 289.

The judgment of the Circuit Court of Cook County is affirmed,

Affirmed,

Robson and Schwartz, JJ., concur.

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ANTON MACAL,)
Appellant,) APPEAL FROM SUPERIOR
v.) COURT, COOK COUNTY.
CHICAGO TUMOR INSTITUTE,)
etc., et al.,)
Appellees.)

91A^{2d}389

JUDGE ROBSON DELIVERED THE OPINION OF THE COURT.

This was an action to recover damages for alleged negligence of defendants in treating the plaintiff with an x-ray machine. Trial was had, and the jury returned a verdict for the defendants. Judgment was entered on the verdict, and plaintiff's motion for a new trial was denied. Plaintiff appeals.

The principal ground urged for reversal is that the court committed error in giving and not giving certain instructions. The first contention is that the court should have given an instruction on the doctrine of res ipsa loquitur. The record reveals that the plaintiff tendered no such instruction. It is indicated that during the trial there was a discussion by counsel as to whether the doctrine applied. There is no showing that such an instruction was offered, the contrary appears in fact. A reviewing court cannot assume that such an instruction would not have been given if offered in writing, and cannot reverse for the failure to give such an instruction when it was not offered. (Hartford Deposit Co. v. Pederson, 67 Ill. App. 142, affirmed 168 Ill. 224.)

As to the other instructions complained of,

THE UNITED STATES OF AMERICA
IN SENATE
JANUARY 12, 1907

REPORT
OF THE
COMMISSIONER OF THE
LAND OFFICE
FOR THE YEAR 1906

THE LAND OFFICE OF THE UNITED STATES DEPARTMENT OF THE INTERIOR
HAS THE HONOR TO ACKNOWLEDGE THE RECEIPT OF THE
REPORT OF THE COMMISSIONER OF THE LAND OFFICE FOR THE YEAR 1906
AND TO TRANSMIT THE SAME TO THE SENATE IN ACCORDANCE WITH THE
PROVISIONS OF THE ACT OF MARCH 3, 1879, CHAP. 122, SEC. 10, STAT.
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plaintiff, in his motion for new trial, made only the following objections: "The court erred in giving to the jury instructions given at the request of the defendants," and "The court erred in refusing proper instructions offered on behalf of the plaintiff."

In the case of Rudolph v. City of Chicago, 2 Ill. App.2d 370, this court expressed its view on the failure to make specific objections to the instructions, and held that the failure to specifically point out the objectionable instructions in the motion for new trial constituted a waiver of that point on appeal. Krug v. Armour, 335 Ill. App. 222; Pajak v. Mamsch, 338 Ill. App. 337; Chism v. Decatur Newspapers, Inc., 340 Ill. App. 42; Weinrob v. Heintz, 346 Ill. App. 30. This ruling is applicable to plaintiff.

Plaintiff further states that the court erred in sustaining an objection to the use of the word "thought" in an answer given by one of plaintiff's medical witnesses to a question asking his opinion as to the cause of plaintiff's eye condition. An examination of the record discloses that the court held that the doctor had the right to make a diagnosis and to give his opinion based on such diagnosis, but that the use of the word "thought" was objectionable. It is the law in this State that an expert may not testify as to what he thought. His answer must be predicated and founded upon an opinion based upon a reasonable degree of medical certainty; otherwise it is mere guess,

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surmise, or suspicion. (Told v. Madison Building Co., 216 Ill. App. 29; O'Donnell v. Snyder, 231 Ill. App. 581.) Plaintiff made no effort after the ruling by the court to reask the question. We are of the opinion that the court did not err in sustaining the objection.

Plaintiff objects to allegedly prejudicial conduct during the trial and in closing argument on the part of the defendants' attorney. The first was that certain objections made by the defendants' attorney to a hypothetical question, and his statement pointing out the facts to be included or excluded, were distortions and misstatements of the evidence which prejudiced the jury. The record reveals that no objection was made by the plaintiff to these statements, and therefore they cannot be raised on appeal. The other contention is that certain statements were made in the closing argument that the defendant Chicago Tumor Institute was now in the process of being merged with the University of Chicago Medical School; that each of them was eleemosynary and charitable in nature. Plaintiff objected to this statement and the trial court sustained the objection and ordered the statement stricken. This was improper but when we examine the record we do not consider it grounds for reversal.

The judgment of the trial court is affirmed.

Judgment affirmed.

McCormick, P. J., and Schwartz, J., concur.

462

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V.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

JUDGE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

91.A^{2d}390

The defense is based on a set-off, it being claimed that Moon, payee of the note, owed defendant substantial amounts in excess of the sum due on the note. This was

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SECRET

...POLITBUREAU MEMBERS WHO
...STILL REMAIN IN OFFICE.

THE UNIVERSITY OF CHICAGO PRESS

DECLASSIFIED BY: 6032 LAM/OS on 01-01-09

• Don't panic if you are asked a question that you don't know the answer to.

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substantiated by the testimony of Graham, president of the defendant company; Dorothy Burns, formerly its office manager; McClintock, sales manager of the Illinois Iron and Bolt Company, a competitor of defendant company; and McCormick, superintendent of defendant corporation. An accountant, Bobsin, testified in detail that he had examined the books of account of the defendant company and that they reflected that Moon was indebted to the defendant as claimed by it. He presented exhibits prepared by him in support thereof. This testimony and other evidence presented by defendant was to the effect: (1) that pursuant to their agreement Moon was indebted to the company for withdrawals in excess of those allowed by his contract of employment, to the amount of \$8000; (2) that Moon submitted and had been paid fraudulent expense accounts in excess of \$6000; and (3) that Moon owed defendant \$250 on account of an emergency fund given him which he had not repaid. Moon died before the trial and his testimony was not available.

On behalf of plaintiff two exhibits were admitted: (a) a letter from Moon to his attorney in which he admitted owing defendant \$250 but asserted without explanation that defendant owed him \$3958 in salary and unpaid earnings; and (b) a certified copy of a complaint filed by Moon in Superior Court against defendant, in which Moon claimed that the Eddy and Chicago Stoker Corporations together owed him \$3958. This complaint was dismissed after Moon's death. We will first consider whether the trial court erred in admitting

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this evidence offered by plaintiff. The only basis for its admissibility is plaintiff's argument that it is within the exceptions to Section 2 of the Evidence Act. (Ch. 51, Ill. Rev. Stats. 1955.) That statute known as the "Dead Man's" Statute has no application to the instant case. Andrews v. Matthewson, 332 Ill. App. 325; Johnson v. Fulk, 282 Ill. 328; Baxter v. Camp, 71 Conn. 245; Chance v. Graham, 76 Ore. 199. In any event the evidence offered was hearsay and not admissible under our law. Upon a retrial of the case as herein ordered this evidence if offered should be rejected.

The remaining question is whether the trial court's finding with respect to the issue of the set-off is against the manifest weight of the evidence. Although no witnesses were presented to controvert the testimony of defendant's witnesses, the trial court at the conclusion of the case stated that it did not believe defendant's witnesses and found the issues for the plaintiff. There is a limitation on the right of a trial court thus to reject the entire testimony of witnesses, particularly disinterested witnesses. It must appear that their testimony is inherently improbable or is contradicted by other testimony or by other circumstances appearing in the record. Porter v. Industrial Commission, 352 Ill. 392, 398; Kelly v. Jones, 290 Ill. 375, 378-9; Bale v. Chicago Junction Ry. Co., 259 Ill. 476, 479; Mammia v. Homeland Insurance Company, 371 Ill. 555, 560.

There is nothing improbable in the testimony of

the witnesses that Moon agreed to pay the excess of his withdrawals nor in the fact that he had padded his expense account. These are controversies that occur continually in enterprises of the character here involved, and such litigation is common in the courts. Plaintiff argues that by reason of Moon's death, witnesses for defendant could testify without fear of contradiction and hence the ordinary limitations on the power of the court to disregard testimony ought not to apply. Courts do and should view testimony with respect to a transaction with a deceased person with caution, but that does not mean that they may completely abandon the limitations referred to.

It is argued that the testimony of the witnesses was too much the same, indicating that they had been coached into presenting a false story. There is no doubt these witnesses were in touch with each other, and they appear to have been in substantial agreement as to facts which occurred years before the law suit was brought. Defendant explains that the controversy had commenced long before the trial and that on several occasions in prior years the case had been prepared for trials which were continued. In addition to the unimpeached witnesses there were entries from books of account presented by an accountant. A court cannot find that evidence of this kind is false when there is nothing in the record to support such a conclusion. A new trial must be allowed.

The judgment is reversed and the cause remanded for such proceedings as are consistent with the views herein expressed.

Judgment reversed and cause remanded.
McCormick, P. J., and Robson, J., concur.

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91.4.391^{2d}

The plaintiff, Ohlsen, had an interest in the Redwood Storm Sash & Heating Co. Defendant was a salesman for that company. He worked on a commission basis and as of February 1953 had been paid \$1,982.12 in excess of his commissions. At that time Ohlsen negotiated a sale of his interest in the company and in connection with that transaction took an assignment of the claim which the company had against defendant, Einspar. He advised Einspar of the sale of his interest in the company and that he had taken an assignment of his claim and thereupon Einspar executed a note to Ohlsen dated February 17, 1953, due 180 days after date, in the sum of \$1,982.12. This note was not paid when due and on August 17, 1953, a new note giving defendant further time was executed. This note was not paid when due and the judgment in question was confessed for the amount of the note plus interest.

Defendant makes the point that "neither the defendant Einspar nor the corporation [Redwood Storm Sash & Heating Co.] expected reimbursement of the drawing account."

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THE UNIVERSITY OF CHICAGO

4.3. Theorem 4.3.1. *If \mathcal{A} is a \mathcal{C}^* -ternary algebra, then the following are equivalent:*

• When a child is only 12 months old, he or she is not yet able to

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... ..

It is a general principle that in the absence of an agreement to the contrary, a salesman on commission is not required to repay the excess, unless it is agreed between the parties that he should do so. Electric Supply Corp. v. Meyrick, 349 Ill. App. 383; Felsenthal Bros. & Co. v. Gradwohl, 217 Ill. App. 170; Srere v. Rapp, 233 Ill. App. 190. In the case cited by defendant, Electric Supply Corp. v. Meyrick, supra, the court held that the evidence on behalf of the plaintiff showed that the drawing account arrangement was one which permitted the plaintiff to recover the excess of the amount drawn over commissions earned. In Strauss v. Cohen Bros. Co., 169 Ill. App. 337, it was also held that the agreement in question was one which contemplated a repayment by the salesman of the excess over commissions earned.

In the instant case it appears that it was understood by the parties that defendant's employment was on a commission basis only and that payments to him would be advanced against such commissions to be earned, with the further condition that defendant would repay any advances in excess of commissions earned. This was testified to by plaintiff and his wife, who was the bookkeeper for the company. In further confirmation of that fact plaintiff introduced a series of 66 exhibits, being pay record sheets, the originals of which were presented to defendant each week by the company. These sheets covered a period of nine months and each one set forth the defendant's account with

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is not to be given, unless it is a question of fact

the question is to be decided by the court.

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the company and under the legend "Due Redwood" showed the amount due that was in excess of the commissions earned. Under examination as an adverse witness Einspar admitted receiving the pay statements showing what was due to Redwood, did not object to them, and admitted that it was a debt against him. He testified that at the time he gave the note to Ohlsen he thought the amount due was a debit against him, "against my drawing account." He later testified that he thought he owed the money. As against this testimony defendant introduced a U.S. Information Return No. 1099. This form is for the income tax information of the government. It requires employers to state "Salaries, Fees, Commissions or other Compensation" paid. Apparently Redwood Storm Sash & Heating Co. considered that it was obligated to make a report of the moneys it paid Einspar even though the books of the company showed that it was not all paid as salaries, fees, commissions or other compensation, but as an advance. In the light of the evidence it is clear that this was only an advance.

The only testimony by defendant in regard to the agreement was in his examination under Section 60 of the Civil Practice Act as an adverse witness. An examination of the record reveals that he specifically stated he signed the note because Ohlsen told him it had been transferred to him (Ohlsen) and that he needed it to conclude the sale of his interest in the company. Einspar admitted he owed the money to the company and that after the assignment

he owed the money to Ohlsen. His testimony leaves no doubt that he understood he was indebted.

Assuming it was a debt to be repaid out of commissions to be earned in the future, the assignment to Ohlsen cleared the account between Einspar and the company, and that was adequate consideration for the giving of the note.

It is next urged that plaintiff was in effect the "assignee of a non-negotiable chose in action" and as the assignment was not alleged and proved pursuant to Rule 22, Civil Practice Act (Ch. 110, Sec. 146), no cause of action was shown. Plaintiff sued on a note in which he was payee, and not by virtue of the assignment. The rule therefore has no application to this case.

The order is reversed and the cause remanded with directions to the court to set aside the order vacating the judgment, to deny the motion to vacate and to confirm the judgment as heretofore entered.

Order reversed and cause
remanded.

McCormick, P. J., and Robson, J., concur.

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Absent

General No. 10880

Agenda No. 20

IN THE
APPELLATE COURT OF ILLINOIS
- - -
SECOND DISTRICT
- - -

FILED

FEB 15 1956

JUSTUS L. JOHNSON
Clerk Appellate Court Second Dist.

October Term, A.D. 1955

9 I.A. 391^{2d}

JOHN B. SCHMIDT,

Plaintiff-Appellee,

vs.

BRUNO V. STILLER and
ALICE E. STILLER,

Defendants-Appellants.

APPEAL FROM THE

CIRCUIT COURT OF

LAKE COUNTY, ILLINOIS.

DOVE, P. J.

By this action John B. Schmidt, a lawyer, with offices in Chicago, seeks to recover from Bruno V. and Alice Stiller \$2850.00 which he alleged in his complaint is due him for legal services rendered the defendants.

Upon the filing of the complaint on September 27, 1954, a summons was issued and/duly served on both defendants. the next day
They made no appearance and on November 9, 1954, an order of default was entered and ten days later on November 19, 1954, judgment was rendered in favor of the plaintiff and against the defendants for \$2850.00. On December 7, 1954, defendants filed their motion to vacate and set aside this judgment and this motion was supported by affidavits of the defendants.

Counter affidavits were filed and upon a hearing the motion to vacate was denied but leave was granted the defendants to file a further motion and affidavits. Thereafter, on April 27, 1955, a further motion supported by affidavits was filed by the defendants. Counter affidavits were filed by the plaintiff and upon a hearing the motion of the defendants was denied and the defendants appeal.

It appears from the record that on August 25, 1954, plaintiff rendered the defendants a statement for his legal services amounting to \$3750.00 and requested payment. In response to this letter, Alice E. Stiller wrote the plaintiff on August 27, 1954, expressing surprise as to the amount of the bill, but enclosing a check for \$900.00. On October 2, 1954, which was four days after the summons in the instant case was served upon defendants, Alice E. Stiller again wrote the plaintiff asking for a detailed statement of his charges.

There were further communications between the parties, but no settlement reached. Defendants had filed no appearance in court, nor were they represented by counsel. On October 29, 1954, the attorney of record for the plaintiff wrote the defendants that he would "appear before the Honorable Judge Decker at the court house in Waukegan at 11:30 a.m. Friday, November 5, 1954, and prove up the case now pending against you by John Schmidt. This notification is in accordance with my agreement. You both should be there." After the receipt of this letter by the defendants, a conference was held on November 4, 1954, at the Deerfield Bank. At this conference, the plaintiff and his attorney and the defendants were present. While this conference was in progress, Bruno V. Stiller, one

of the defendants, called Marvin Wallach, an attorney, at his office over the telephone and after Mr. Wallach answered the phone, plaintiff's attorney conversed over the phone with Mr. Wallach and after so doing, plaintiff's attorney told defendants that he would not prove up plaintiff's case against the defendants on November 5, 1954. According to the affidavit of Bruno V. Stiller, the reason why he and his attorney agreed not to take any steps in the case on November 5, 1954, was because Mr. Wallach, then representing the defendants, requested the plaintiff not to proceed at that time as he desired an opportunity to further consult with his clients.

It further appears that on the following day Mr. Wallach contacted the plaintiff over the phone and learned from the plaintiff that no compromise could be effected and either the next day or the following day, Mr. Wallach again contacted the plaintiff over the phone and in the course of their conversation, Mr. Wallach advised the plaintiff that he would have no further participation in the proceeding. The affidavit of Mr. Wallach is to the effect that he had originally represented the defendants in an injunction proceeding pending in the Superior Court of Cook County; that during its pendency he withdrew as their attorney and consented and agreed to the substitution of the plaintiff as attorney for the defendants; that in the instant proceeding, the defendants requested him to represent them, but he declined, recommending that they retain local counsel in Waukegan; that he advised the plaintiff that he did not represent the defendants as their attorney and that he had only been attempting to act as mediator.

The Civil Practice Act provides that the court in which a judgment is rendered may, in its discretion, before final judgment, set aside any default and may, within thirty days after entry thereof, set aside any judgment or decree upon good cause shown by affidavit upon such terms and conditions as shall be reasonable. (Ill. Rev. Stat. 1953, Chap. 110, sec. 50, par. 174, sub-par. 7) Our Practice Act further provides that its provisions shall be liberally construed to the end that controversies may be speedily and finally determined according to the substantive rights of the parties. (Ill. Rev. Stat. 1953, Chap. 110, sec. 128, par. 4)

A motion to set aside a judgment and vacate an order of default is addressed to the sound legal discretion of the court in which it is made and unless there has been a palpable abuse of such discretion an appellate court should not interfere. If, however, the action of the court to which the application is made is unjust and oppressive and has resulted in a substantial injury to appellants, such action will be reversed on review. Such motion or application should show a meritorious defense and a reasonable excuse for not having made that defense in due time. (Hitchcock v. Herzer, 90 Ill. 543)

In Mason v. McNamara, 57 Ill. 247, the court, after stating that as a general rule the Supreme Court would not review the action of the lower courts in matters of discretion, went on to observe that cases may arise in which there has been such a state of facts as to call upon the upper court to interpose, to promote justice, by reviewing the decision of the circuit court even in the exercise of discretionary powers.

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The court then said (p. 277): "As we understand the long and well settled practice in this state, it has always been liberal in setting aside defaults at the term at which they were entered, where it appears that justice will be promoted thereby. - - - Where it appears by affidavit that the party has a defense to the merits, either to the whole or a material part of the cause of action, it has been usual to set aside the default, if a reasonable excuse is shown for not having made the defense. - - - In such cases the object is that justice be done between the parties, and not to permit one party to obtain and retain an unjust advantage."

In *McMurray v. Peabody Coal Company*, 281 Ill. 218, at p. 226, the court said: "It has been the long and well established practice in this state for courts to be liberal in setting aside defaults at the term at which they are entered where it appears that justice will be promoted thereby."

In *City of Moline v. C. E. & Q. Railroad Company*, 262 Ill. 52 at p. 65, in reversing a judgment and remanding the cause with directions to set aside the judgment of the lower court in a special tax proceeding and permit appellant to file objections to the confirmation of the tax, the court said: "Under the long and well settled practice in this state the courts have been liberal in setting aside defaults at the term at which they were entered where it appears that justice will be promoted thereby. When it appears by the affidavit filed in support of the motion that the party has a defense to the merits, either to the whole or a material part of the cause of action, it has been usual to set aside the default if a reasonable excuse is shown for not having made the defense."

We recognize that where defendants are served with process and fail to act either from negligence or without any reasonable excuse, they have no right to insist that they be permitted to defend. In the instant case defendants did not treat this summons with indifference, but within a few days after service, one of the defendants wrote plaintiff, her former attorney, in connection with the subject matter of this action. There were further communications had between the parties and an agreement had that before the case went to hearing, plaintiff's attorney would notify defendants thereof. Counsel for plaintiff recognized this agreement and complied therewith and notified defendants that he would proceed in court on November 5th and requested them to be present. On November 4th, however, the day before the scheduled hearing, the parties had another conference and at its conclusion, defendants were told by plaintiff and his attorney that nothing would be done in court the following day. There were no further communications between the parties prior to the time default was entered on November 9th, except plaintiff was advised by the only attorney with whom defendants had consulted that he, Mr. Wallach, did not represent defendants as their attorney and this information was given plaintiff at least two days prior to the time the default was entered.

The power to set aside a default and permit a defendant to have his day in court is based upon substantial principles of right and wrong and is to be exercised for the prevention of injury and the furtherance of justice (31 Am. Jur. 279). The question in the instant case is whether

defendants were reasonably justified in relying upon the promise or agreement of plaintiff's counsel. We think they were. Their failure to attend the hearing was excusable. (see Loomis v. Tadlock, 1 Ill. App. 2d 298; Rowe v. Mardis, 4 Ill. App. 2d 81, 123 N.E. 2d 340)

Plaintiff's patience and that of his counsel may have been severely tried at the attitude of defendants and their showing as to a meritorious defense to plaintiff's claim is not very satisfactory, but under all the circumstances we feel that the furtherance of justice requires that defendants be permitted to have their day in court.

The judgment of the circuit court is reversed and this cause is remanded with directions to vacate the judgment and permit defendants to answer plaintiff's complaint.

Reversed and remanded with directions.

Eovaldi, J. concurs.

This correction and change made as per letter from Mr. Justus L. Johnson, received March 29, 1956, dated March 28, 1956.

"This case is reversed to the Circuit Court of Lake County with directions to enter an order setting aside the order defaulting the defendants which was entered November 9, 1954, opening up the judgment and directing the defendants to answer within a short day to be fixed by the court and directing that the judgment rendered November 19, 1954, remain a lien, as provided by law, until the further order of the Circuit Court."

Modified opinion, March 28, 1956 is not to be noted with the rehearing denied date, as per Mr. Latta.

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In The
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, 1956.

9 I.A.^{2d} 416JUSTUS L. JOHNSON
Clerk Appellate Court Second Dist.

CHARLIE COBY,

Plaintiff-Appellee,

vs.

JOHN TURNER,

Defendant-Appellant.

Case #11
Appeal from
Circuit Court,
Winnebago County.

BOVALDI -- J.

This is an appeal by defendant from a judgment of the circuit court of Winnebago County for \$6500 entered on the verdict and special finding of a jury for injuries sustained by the plaintiff for an alleged assault and battery by the defendant at a cafe operated by defendant. The jury also returned a verdict finding counter-defendant not guilty. Motions for judgment notwithstanding the verdict and for new trial were overruled and a new trial denied.

In his complaint for damages of \$50,000, plaintiff charged that the defendant on the 5th day of June, 1954, forcibly and unlawfully and wilfully made an assault on the plaintiff in that the defendant pulled out a "billy club" and struck the plaintiff on the left forehead with the same; that

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JUSTUS L. JOHNSON
Chief Appellate Court Second Dist.

by reason and in consequence of said assault and battery by defendant and as a direct and proximate result thereof the plaintiff sustained severe injuries of the left forehead; his left eye was severely hurt; he suffered great nervous shock; received hospital treatment for 10 days; lost the vision of his left eye; and received injuries which were permanent; that he incurred expenses in excess of \$350 for medical, surgical and hospital services and would have future medical expenses; and that he lost his employment. The complaint further alleged that the assault and battery was wilful and malicious and prayed for punitive damages in addition to the actual damages sustained by the plaintiff.

The defendant filed an answer to the complaint denying the material allegations of same. He filed a further defense, paragraph II, alleging that the plaintiff assaulted the defendant with a knife, that the defendant acted in self-defense, and in so doing necessarily and unavoidably hit the plaintiff but used no more force than was necessary. The defendant also filed a Counterclaim for \$50,000 against the plaintiff alleging that the counter-defendant unlawfully assaulted the counter-plaintiff with a deadly weapon, a knife; that as a direct and proximate result thereof the counter-plaintiff sustained severe injuries, both external and internal; that the skin of the thumb, index finger and second finger of his right hand were cut; that he suffered a severe nervous shock; that he became sick, sore and disabled and has suffered and will suffer great physical pain; that his injuries are permanent; that he will be obliged to spend sums of money for medical, surgical and hospital services and is hindered from attending to his

usual affairs and employment and has lost and will lose large sums of money which he otherwise would have earned; that the assault and battery of the counter-defendant upon the counter-plaintiff was malicious and that the counter-plaintiff is entitled to recover punitive damages in addition to actual damages. The counter-defendant, Charlie Coby, filed an answer denying the allegations of paragraph II of the answer and denying the allegations of the counterclaim.

In his appeal the defendant and counter-plaintiff charges that he was denied a fair trial by an impartial jury; that the verdicts and special finding are against the manifest weight of the evidence; that the court should have granted the motion for judgment notwithstanding the verdicts and the motion for new trial because, among other grounds, of newly discovered evidence.

Roziner Coby, wife of the plaintiff, testified that about 10:00 or 11:00 o'clock at night on June 4, 1954, she and her husband went to John Turner's place, a two-story house with a bar downstairs, where they danced and played records until about 1:00 o'clock, at which time they walked her sister-in-law home, returning at 2:00 o'clock. That she and her husband drank beer and danced and then her husband went outside and when he returned the defendant "patted her husband down" and took a knife off of him; that they danced and drank more beer and at about 7:00 or 8:00 o'clock that morning started to go home. That her husband then went to get a half pint of whiskey and went back to the bar for that purpose. That she heard a commotion and there was an argument between plaintiff and defendant about some change; that she took a Coca-cola bottle away from her husband, set it by the cigarette machine,

and they both started out. That as they were leaving, the defendant said, "All you Coby's think you are smart." Plaintiff looked back and said, "Who are you talking to?" About that time defendant came out with a stick about a foot and a half long and hit her husband in the left eye with it and her husband fell to the floor. That one Ulysses Thurman took her and her husband to the hospital.

She further testified that thereafter the defendant came to her home on June 6 to inquire about her husband and the defendant offered her money and told her if she would withdraw her suit, the warrant taken out against him, he would pay all the expenses, and further that he would give them property and a home and would take care of all the responsibility. On cross-examination she denied that her husband had an altercation with or threatened one Leslie Wells who was standing at the bar at the time of the argument over the change and denied that the defendant knocked the knife out of her husband's hand. On re-direct examination, she testified that her husband worked at Rockford Pattern Shop about two years.

Plaintiff testified that he went to Turner's Cafe about 10:00 or 11:00 o'clock at night on June 4, 1954; that his wife and sister were with him, that they bought a round of beer and at 1:00 o'clock they walked his sister home and returned at 2:00 o'clock. After returning he went outside to the restroom and that when he came back the defendant was at the door, "patted him down" and the plaintiff gave the defendant his knife. That they continued to drink beer and play records and dance and started to go home about 6:00 or 7:00 o'clock in the morning. That just before leaving he went to the bar to get

a half pint of whiskey and that an argument ensued over some change; that he picked up a Coca-cola bottle, his wife caught his hand and took it away from him; that he started out and Turner came from behind the counter with a stick or a billy club and said, "You think that you are goddam smart," and hit him and he fainted. That he had been working at the Rockford Pattern Shop since 1953 and drew \$96.80 every two weeks as take-home pay.

He was asked what was the condition of his eyes before June 5, 1954, and over objection, the court permitted him to answer, and he stated his eye was perfect. When asked if he could see out of his left eye he answered over objection, "I really could see out of this eye, this eye was perfect." On objection and motion made by defendant, the court instructed the jury as follows: "That voluntary answer may be stricken and the jury is instructed to disregard it, it is not an answer to any question." The plaintiff further testified that one Dr. Duchon treated him at the Rockford Hospital, where he stayed for two weeks; that since June 5 he had not worked. On cross-examination he testified that he could see to walk along the street in the day time, but not good enough to work. He denied that he followed one Leslie Wells toward the door and denied that he threatened him and denied that he had a knife. He stated that he had taken three or four steps from the bar when defendant came from behind the bar, grabbed him, turned him around and said, "You think you are dam smart," and he answered, "Who are you talking to?" and defendant struck him with a club and he fell. On re-direct examination he testified that his left eye had been completely removed on June 5.

Method Louis Duchon testified that he was a physician

and surgeon, specializing in the treatment of the eye and its diseases and licensed to practice medicine in the State of Illinois. That he examined plaintiff on June 5 at 8:30 in the morning. That the left eyeball was ruptured and he removed the eye that afternoon. That subsequently he examined the right eye of the plaintiff, found a visual disability and that the vision of the plaintiff was seriously injured. He further testified that \$150.00 was a reasonable charge for doctor's services rendered and that the defendant paid \$15.00 of that charge on June 14, 1954. That he had a conversation with the defendant in his office and the defendant stated that he was going to be responsible for the bills incurred in the treatment of plaintiff. He further testified that \$45.00 was a reasonable charge for anesthetist services and \$370.00 was a reasonable charge for hospital services from June 5 to June 17.

The defendant was called as a witness under Section 60 of the Civil Practice Act and stated that on June 5, 1954, he operated John Turner's Night Spot Cafe and admitted that he paid \$50.00 on the hospital bill and that he had agreed to pay the hospital bill and had signed a note for its payment; that when the lawsuit was filed he refused payment on the bill. He further testified that he had paid \$15.00 to Dr. Jackson and told him he would pay the balance of the doctor bill. He denied promising to give Mrs. Coby property, and stated he did not make her any promises.

Verda Smucker testified for the plaintiff that she was credit manager at the Rockford Memorial Hospital and that the defendant had made arrangements to pay the hospital bill for plaintiff and signed a note for payment of the balance of the hospital bill.

The evidence of the defendant and of the four witnesses who testified in his behalf is substantially as follows: That the plaintiff was at John Turner's Cafe on June 5. That he was sitting around eating and drinking with his wife and two or three more friends. That Turner was not at the Cafe, and came in about 6:00 o'clock in the morning. That about 6:00 o'clock in the morning, the plaintiff went to the counter to make a purchase and that there was an argument concerning the change to be returned to the plaintiff. That plaintiff got into an argument with Leslie Wells. That Leslie Wells started to go and the plaintiff attacked Leslie Wells with a knife and at that time the defendant grabbed the plaintiff and scuffled with him knocking the knife to the floor. That the plaintiff picked up the knife and chased the defendant back 15 or 20 feet to the counter and when the plaintiff persisted in his attack upon the defendant, that the defendant hit the plaintiff with a short club or stick knocking the plaintiff to the floor. Leslie Wells testified/^{for}defendant stating that he was acquainted with the defendant, was in the restaurant of defendant in the early morning of June 5, 1954, and saw plaintiff there. That when he came in at 6:00 o'clock in the morning Coby was standing at the counter and he heard Coby and another fellow arguing about some change or something about change. That Coby said something out of the way and he replied that he didn't argue. That he turned his back and walked to the door and that when he got to the door he heard someone say "look out," he was coming with a knife; that he turned around and Coby had the knife and that Turner told him to give him, Turner, the knife, and Coby refused and turned upon Turner, and that is when Turner hit him; that they had a little tussle with the knife and that Turner

took the knife from him and that when Coby reached the bar that was when Turner hit him. On cross-examination, plaintiff's attorney asked the witness Leslie Wells concerning inconsistent answers to questions asked of him on June 12, 1954, in the office of the attorney for the plaintiff, at which time he had answered that he had not seen a knife or anything on the floor and that he thought Turner had a pistol and that he did not see a knife and that if the plaintiff had a knife he didn't see it. These impeaching questions were asked the witness over the objection of the attorney for the defendant who seeks reversal of this cause on the ground that these were not material or relevant matters, and therefore he was denied a fair trial. As related heretofore, this witness testified on direct examination that the plaintiff had a knife. As disclosed by further examination of the record, this witness testified on cross-examination that during the scuffle defendant got the knife from plaintiff. Considering the different statements made by the witness in the office of plaintiff's attorney on June 12, 1954, these impeaching questions touched upon the issue of self-defense interposed by defendant, and also upon whether or not as counter-plaintiff he was entitled to recover on his counterclaim. These matters were both material and relevant. We find no merit in this contention.

Defendant's other contention that he was denied a fair trial by an impartial jury is based on what he describes as the admission of opinion evidence by plaintiff relative to the vision in his left eye before and after the injury. The only case relied on or cited by defendant to bear out his contention is a Compensation Case, International Coal Co.

v Indus. Com., 293 Ill. 524. That case is authority for the rule of law that it is competent for plaintiff, though he be not qualified as an expert, to testify as to his state of health and as to his ability to do certain things in the use of the injured member before and after the accident, as well as any other fact which would enable the Commission to draw an inference as to the ultimate fact to be determined, although it is within the province of the Commission to determine the ultimate fact as to how much and to what extent the plaintiff is injured. To the same effect is the case of Bobalek v Atlase, 315 Ill. App. 514, a case at law. Considering the action of the court in striking a portion of the answer given by plaintiff, and considering that the jury had ample opportunity to observe plaintiff while he was testifying, and that the physician and surgeon testified that he removed the eye, we cannot see how defendant's rights were prejudiced by the evidence as to plaintiff's condition.

The defendant complains that the verdicts were against the manifest weight of the evidence. The jury saw and heard the witnesses. Where disputed questions of fact are presented to a jury and the jury passes upon them, unless palpably erroneous, the finding of fact will not be disturbed by the reviewing court. Griggas v Clauson, 6 Ill. App. 2d 412; People v Manisch, 361 Ill. 465; Brug v Armour & Co., 335 Ill. App. 222; Becherer v Belleville-St. Louis Coach Co., 322 Ill. App. 37; Rembke v Bieser, 289 Ill. App. 136; Leahy v Morris, 289 Ill. App. 99. To be against the "manifest weight of the evidence" requires that an opposite conclusion be clearly evident. Griggas v Clauson, supra, at p. 419;

Olin Industries, Inc. v Mueller, 1 Ill. App. 2d 267; Schneiderman v Interstate Transit Lines, Inc., 331 Ill. App. 143, 147. We have examined the record and do not find that the verdict is manifestly against the weight of the testimony. Under these circumstances we have no right to set aside the jury's finding.

It is urged by defendant that the court erred in denying his motions for a directed verdict and for a judgment notwithstanding the verdicts. These motions present the single question whether there is in the record any evidence which, standing alone and taken with all its inferences most favorable to the party resisting the motion, tends to prove the material elements of his case. Seeds v Chicago Transit Authority, 409 Ill. 566; Lindroth v Walgreen Co., 407 Ill. 121 at page 130; Jorczynski v Agent, 402 Ill. 147 at page 156; Weinstein v Metropolitan Life Ins. Co., 389 Ill. 571 at page 576. We are not concerned with the weight or credibility of the evidence, but only with the narrow question whether there is any evidence, together with all reasonable inferences to be drawn therefrom, which would justify submission of the case to the jury. Lindroth v Walgreen, supra, at page 130. The trial judge properly denied the motions for directed verdict and for judgment notwithstanding the verdicts.

The defendant further contends that his motion for new trial should have been granted on the ground of newly discovered evidence. In support of same, he submitted the affidavits of four persons. An examination of the affidavits of these purportedly newly discovered witnesses disclose statements appearing in each affidavit respectively such as "I have known John Turner for a long time"; "I have known

John Turner about eight years"; "I am acquainted with John Turner"; and "I have known John Turner for several years"; and an examination of the affidavit of the defendant, giving the names and street addresses of each of said purported witnesses, evidently convinced the trial court that these witnesses were available and known to the defendant long prior to the trial. Two of the said witnesses left the restaurant approximately three hours before the occurrence. The affidavits of the other two witnesses disclose that their testimony at best is merely cumulative. There is not sufficient showing of diligence in locating these witnesses before trial on the part of defendant as would justify granting his motion for new trial based on said ground. Applications for new trial on the ground of newly discovered evidence are not looked upon with favor by courts, but such applications are to be subjected to close scrutiny. The burden is on the applicant to rebut the presumption that the verdict is correct and to show that there has been no lack of due diligence. *People v LaForte*, 289 Ill. 11; *Powers v Browning*, 2 Ill. App. (2d) 479. On page 486 of its opinion, the court, in *Powers v Browning*, supra, quotes from *People v Dabney*, 315 Ill. 320, as follows:

"The evidence must fulfill the following requirements: First, it must appear to be of such conclusive character that it will probably change the result if a new trial is granted; second, it must have been discovered since the trial; third, it must be such as could not have been discovered before the trial by the exercise of due diligence; fourth, it must be material to the issue; and fifth, it must not be merely cumulative to the evidence offered on the trial (citing cases)." *Stocker v. Scherer*, 1 Ill. 2nd 405."

In *Cohen v Sparberg*, 316 Ill. App. 140, the court on pages

142-143 quotes from Chicago & Alton R. Co. v. Haidy, 203 Ill.

310, 317, as follows:

"It cannot be the practice of courts to allow important matters to go to trial, and because one party is not satisfied with the results of it, let him go out and try to get facts which will enable him to do better at another trial, and rely upon such after-ascertained matters as a basis for a new trial."

On page 144 of Cohen v. Sparberg, supra, the court said: "As was aptly said in Stoll v. Cottlieb, 305 U.S. 165: 'It is just as important that there should be a place to end as that there should be a place to begin litigation.' Trustees of Schools of Tp. No. 38 v. City of Chicago, 308 Ill. App. 391." As stated in Stocker v. Scherer, 1 Ill. 2d 405, 409: "The disposition of motions of this nature is largely discretionary with the trial court, and the exercise of its discretion will not be disturbed except in a case of manifest abuse."

Over the objections of the defendant, the court submitted to the jury the following special interrogatory tendered by plaintiff: "Did the defendant, John Turner, commit a wanton and malicious assault and battery on the plaintiff, Charlie Goby?" which the jury answered: "Yes." Defendant contends that the interrogatory was improper, was misleading and ignored the affirmative defense of self-defense; and that it served no purpose in the case but to confuse the jury, and that he was prejudiced thereby. No special interrogatory was tendered by defendant. We are of the opinion that the trial court properly submitted this interrogatory to the jury. The complaint charged that the defendant "forcibly and unlawfully and wilfully made an assault on the plaintiff, * * * and that the assault and battery was wilful and malicious."

Plaintiff prayed for punitive damages in addition to the actual damages sustained. The special interrogatory followed the allegations of the complaint. We fail to see how this could confuse the jury. In the recent case of *Patterson v Dempsey*, 2 Ill. App. 2d 291, this court in a like case held that the lower court did not commit any error in submitting to the jury a special interrogatory calling for an answer as to whether defendant did commit a wanton and malicious assault and battery upon plaintiff. We adhere to the holding in that case.

Plaintiff tendered fourteen instructions, of which eleven were given. Defendant tendered twenty-one instructions, of which twelve were given. One instruction was given on behalf of the court. Of the eleven instructions given on behalf of plaintiff, defendant objects to seven. Defendant also objects to the action of the court in refusing eight of the nine instructions offered by him. To try and treat each one of the instructions separately would unduly lengthen this opinion. We have carefully considered the arguments of the defendant with reference to the instructions and we cannot see how he has been in any way prejudiced by the giving or refusing of any certain instructions nor that any of said given instructions appear to be erroneous. As said by our Supreme Court in *Meyer v German*, 407 Ill. 400, 406:

"A case which has been fairly tried, and where the appellant has not been prejudiced by the giving of any instruction, should not be reversed because of some technical nicety in argument conjured in the minds of counsel for the appellant."

It appearing to this court that the parties have had a fair trial, the judgment of the circuit court is therefore affirmed.

Judgment affirmed.

Howe P. J. Conners,
Chief Justice Conners

46587

ELSIE LAIHO,

Appellant,

v.

M. W. SBERTOLI, and RACHEL LOUISA
McGARRY, Administratrix of the
Estate of J. L. McGARRY, Deceased,

Appellees.

91A. 2d 416
APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

JUDGE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff's complaint charged defendants M. W.

Sbertoli and J. L. McGarry, both physicians, with malpractice in their delivery of her child at birth. A trial with a jury resulted in a verdict of not guilty. Plaintiff's motion for new trial having been denied, judgment was entered on the verdict, and plaintiff appeals.

Defendant McGarry died, and the administratrix of his estate was made defendant. The essence of the charge was that the doctors were guilty of negligence in attending the birth of the child, and caused a fracture of plaintiff's left femur.

It appears that plaintiff, 46 years of age at the time of the hearing, had suffered since 1937 with a chronic condition of arthritis in both feet. In October, 1945, the arthritic condition of the left leg made her walk abnormally. She had become pregnant during the month of February, 1945, and was examined by defendant Sbertoli on October 29, 1945. The child in question was born dead on November 20, 1945. Dr. McGarry was in charge of the delivery, assisted by Dr. Sbertoli. Plaintiff testified that they had her legs in stirrups during the delivery.

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1. What is the purpose of the study?
 2. What are the research questions?
 3. What is the significance of the study?

• 1991 •

The only evidence offered by plaintiff, upon which she relies for a reasonable inference to be drawn that the defendant doctors were guilty of causing the fracture, was a report of Dr. LeDoux, the roentgenologist on the staff of the hospital where the child was born, and from other testimony that she had not suffered and was not suffering from any fracture at the time she was admitted to the hospital for the delivery of the child. The X-ray taken by Dr. LeDoux and his report of the condition shown in the X-ray, and found in the hospital record, disclosed a fracture of the left femur. Dr. LeDoux testified that his report, with respect to the fracture of the left femur, and the X-ray did not refer to plaintiff but to some other patient, and were mistakenly made a part of the hospital record of plaintiff. Based on this testimony, the court excluded, upon objection of defendants, the X-ray and report of Dr. LeDoux with respect to the fracture, and admitted in evidence the rest of the hospital record of plaintiff without objection from defendants.

The principal contention for reversal of the judgment is that the court committed error in excluding the X-ray and report referred to. We think there is no merit in this contention. As a general rule, a hospital record is not competent as evidence, except that it may be used to refresh the recollection of the witness who made the entry. Wright v. Upson, 303 Ill. 120, 144; Western Electric Co. v. Industrial Com., 349 Ill. 139, 146; People v. Zalimas, 319 Ill. 186. An exception could apply in a charge of malpractice against a physician, where it is shown that the doctor so charged had read the hospital record, was familiar with it and relied upon it, even though the entries were made by someone else, if his

reliance upon such entry without a reasonable checkup on his part would disclose negligence on his part, resulting in the injury complained of. Wright v. Upson, supra, p. 144.

Dr. Sbertoli testified that he did not agree with the report he saw in plaintiff's hospital record with respect to the alleged fractured femur and did not rely on it. Upon this state of the record, the court was justified in refusing to admit said report. There were subsequent X-rays taken of plaintiff's left femur at another hospital, and there appears a sharp dispute in the medical testimony as to whether said subsequent X-rays disclosed the alleged fracture. There is no evidence that the defendant doctors treated the plaintiff during childbirth in any way that did or could create the fracture complained of. There is no medical testimony of any causal connection between the claimed fracture and any of the medical treatment complained of.

Defendant argues that the cause should never have been submitted to the jury, because there was no evidence upon which the jury could find defendants guilty of malpractice. It is unnecessary to pass upon this contention, since there was a favorable verdict for the defendants. The record justifies the verdict.

Plaintiff complains of the refusal to give instructions Nos. 15, 16 and 18 on behalf of plaintiff. We have examined these refused instructions, and we think the court was justified in its ruling. They assumed facts not based upon evidence.

We have also considered other points raised by plaintiff and find no merit in them.

The judgment is affirmed.

AFFIRMED.

KILEY, J., concurs.
LEWE, P.J., took no part.

No. 10890

Abstract

Agenda 7

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APR 3 - 1956

STUS L. JOHNSON
Appellate Court Second Dist.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
February Term, A. D. 1956

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,
vs.
CHESTER NAILS,
Plaintiff in Error.

9 I.A. 2d 117
Writ of Error to
County Court of
DuPage County.

EOVALDI, -- J.

To an Information, consisting of two counts, charging defendant with being an accessory to an offense, and charging him with failure to stop and render aid to an injured person, the defendant plead not guilty. A jury trial was had, resulting in a verdict finding defendant guilty of the crime of leaving the scene of an accident, upon which the court, after overruling motions for new trial and in arrest of judgment, rendered judgment imposing upon the defendant a fine of \$500; to reverse which this writ of error is prosecuted.

The Information charged that Chester Nails on the 7th day of April, A. D., 1954, being a passenger in a motor vehicle driven by one Ray C. Rocke, then and there involved

FILED
APR 3 - 1952
J. L. JOHNSON
Appellate Court Second District

in an accident on Route #64, situated in the County of DuPage and State of Illinois, wherein the said motor vehicle was driven into the person of Orville Topel and knowing that the said Orville Topel had sustained personal injuries did aid, abet and assist the driver of said motor vehicle to leave the place of the accident without giving his name, address and motor vehicle number, in that to-wit: the said Chester Nails did drive the said motor vehicle and the said Ray C. Rocke from the scene of the said accident without leaving information as to his name, address and motor vehicle number; and Count II, that said Chester Nails was then and there involved in an accident on Route #64, situated in the County of DuPage and State of Illinois, wherein one Orville Topel was struck by a certain motor vehicle which caused the said Orville Topel to sustain personal injuries and that the defendant failed to stop, give information as to the name of the driver, address and the registered number of the motor vehicle, and did fail to render reasonable assistance and aid to the said injured person, and that the said Chester Nails did drive and propel the said motor vehicle from the scene of the accident, * * .

The applicable sections of the Motor Vehicle Act are as follows:

Section 133, § 36, Chapter 95½, Motor Vehicles, Ill.

Rev. Stat., 1953:

"(a) The driver of any vehicle involved in an accident resulting in injury to or death of any person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible but shall then forthwith return to and in every event shall remain at the scene of the accident until he has fulfilled the requirements of Section 38."

"(b) Any person failing to stop or to comply with said requirements under such circumstances shall upon conviction be punished by imprisonment for not less than 30 days nor more than 1 year or by fine of not less than \$100 nor more than \$1,000, or by both such fine and imprisonment."

Section 135, § 38:

"The driver of any vehicle involved in an accident resulting in injury to or death of any person or damage to any vehicle which is driven or attended by any person shall give his name, address, and the registration number of the vehicle he is driving and shall upon request and if available exhibit his operator's or chauffeur's license to the person struck or the driver or occupant of or person attending any vehicle collided with and shall render to any person injured in such accident reasonable assistance, including the carrying, or the making of arrangements for the carrying of such person to a physician, surgeon, or hospital for medical or surgical treatment, etc."

Section 236, § 135:

"Every person who commits, attempts to commit, conspires to commit, or aids, or abets in the commission of any act declared herein to be a crime, whether individually or in connection with one or more other persons or as principal, agent or accessory, shall be guilty of such offense, and every person who falsely, fraudulently, forcibly, or wilfully induces, causes, coerces, requires, permits, or directs another to violate any provision of this Act is likewise guilty of such offense."

Plaintiff's in error

~~Exposition~~ theory of the case is that Count I was wholly devoid of proof of guilt and that Count II does not state a crime, inasmuch as in Count II defendant was charged with failing to render aid and assistance to the injured party, and since the statute only required that the driver of the vehicle involved render reasonable assistance and aid, and since Count I admits that the defendant was only a passenger, there was no statutory duty on the part of the defendant to render aid and assistance as charged in said Count II.

[9] "Istina i pravda"

~~XXXXXXXXXXXX~~

Six witnesses testified on behalf of the People. No evidence was submitted by the defendant. Orville Topel testified that he was a deputy sheriff for DuPage County on the 7th of April, 1954; and that about 1:00 a.m. in the morning it was foggy; that he was on duty in a squad car alone and was involved in an accident about 1/2 to 3 quarters of a mile from Glen Ellyn; that he had left the intersection of Route 83 and Route 64 from a gas station referred to as Kahn's Service Station, near the City of Elmhurst; that deputy sheriffs work out of Wheaton; that there was not much traffic on the road that evening; that while proceeding in a westerly direction on Route 64, otherwise known as North Avenue, he was travelling about 20 or 25 miles an hour and observed two or three automobiles pass him in a group and he noticed that the lead machine was weaving in a very erratic manner; that he pulled the machine to the side of the road to ascertain the condition of the driver, or the reason for the car weaving; that he stopped the vehicle just west of the east bridge of the DuPage River approximately one block west of Swift Road near Glen Ellyn; that he pulled his vehicle entirely off the road into a driveway of a home; that there were quite a few homes in that immediate vicinity; that he had a conversation with the driver of the car and that he noticed other cars during his discussion with the driver of the first car; that another car came along from the east heading west in the outside west bound lane of North Avenue. He testified that while watching the headlights he noticed this car veer off to the south across all four lanes of North Avenue and into a ditch on the East side of the bridge; that he went to the vehicle after it got in the ditch and that the

driver was unable to get the car out of the mud; he summoned help from the Wheaton office of the Sheriff on the two-way radio. Knowing that it was quite foggy, he decided to put up flares so that people would know "something was going on down there." That he went back to his vehicle parked on the north side of North Avenue and procured five flares. At the abutment end of each cement portion of the bridge there was a wooden stake and he placed a lit flare in the top of each wooden stake; that they were red flares observable through a fog; that he held a fifth flare in his hand for protection not only for himself but for the drivers so that they could see that somebody was up there, and that a red flare was going; that while waiting for the tow-truck another woman pulled up; he did not identify her or the driver of the first car or the second car that went into the ditch. The driver of the third car told him that her name was Mrs. J. J. Fitzgibbons of Glen Ellyn and asked him for help. She asked if she could park there and wait for the fog to lift; she was afraid to drive and felt more secure with the police officer being on the scene and flares to protect her from traffic; that at her request he radioed his office to telephone her husband to let him know her whereabouts; that he then went back and checked with the "fellow" who had run off the road into the ditch, conversed for five or ten minutes with him and then decided to check on the tow-truck; went back to his squad car, picked up the two-way receiver and was advised that it would be approximately a half hour before the tow-truck arrived due to weather conditions. That he got out of his squad car and noticed the flare at the southwest corner of the bridge had gone out leaving three flares ignited. Assuming, that having placed them all

at approximately the same time, the others were due to go out shortly, he procured four flares from the trunk of his vehicle and struck one while standing off the highway carrying the replacement flares in his left hand; that he proceeded to cross the road with the flare in front of him where it could be visible to traffic to replace the one that had gone out. There was a truck at the scene at that time which had come from the east. He had a conversation with the truck driver and stepped out onto the pavement carrying the lighted flare in his hand. After that, he did not remember a thing. He woke up in the hospital nine days later with a blood clot at the center of his brain and had two crushed legs; he did not see or hear the vehicle that struck him; he was standing about on the center line of North Avenue when struck. He had not been able to return to active duty since the date of the accident, and had not been in any accidents since then. On cross-examination he testified it was foggy and he was in the center of the highway having its safety zone with two yellow stripes on it. He further testified that he had a civil action pending in DuPage County; that as a result of being struck he was immediately rendered unconscious and did not remember anything after that except what was told him.

Leah Showalter testified that she was going along North Avenue about 1:00 in the morning coming from the Golden Pheasant where she worked as a waitress; that she was driving her own Mercury vehicle; that she was proceeding home on North Avenue in a westerly direction and that it wasn't foggy until she hit a certain place about a mile up the road; that she passed Mr. Topel about a mile from the Golden Pheasant

and got into a big fog and couldn't see; just like a veil had dropped down over the windshield; that she was driving along and heard a siren blow and she knew she was on the wrong side of the road and pulled up suddenly and was near a culvert; that Orville Topel stopped her and she was still on the wrong side of the road and he said, "What's the matter?" and she said, "I couldn't see, it was too foggy." He said he would take her to Wheaton with his foglights if she would wait, so she pulled off the road; that it was real foggy and you couldn't see your hand in front of you; that Mr. Topel pulled into a driveway in front of her; that he put four flares around the four corners and some along the street on the opposite side of the street, that would be the south side of North Avenue. He said there was someone down in the ditch across the street and "if I would wait until he got him out then I could follow him." She waited, and he came back and forth to his car with a flare in his hand and he had a big flashlight and kept radioing to ask for help for the other car and it was still foggy; that a woman came along and pulled up beside her car and asked her where she was going; that she said she was going to Wheaton; that the other woman said, "Do you think you will get there alive?" That she answered, "Mr. Topel would take her there if she would wait," and she told this other woman to wait; that she got out of the car and left it on the highway; that he came back and pulled the car off the road for her; that he went back and forth a few more times and she did not know how long they were there when a truck driver stopped. That he had a lot of lights on it and he was ahead of Mr. Topel's

car and had flares; that when Mr. Topel came back he had a flashlight and a flare; that he went and got some more, evidently one had gone out, she didn't know, but he had a flare in his hand and she could see lots of flares across on the other side, and the truck driver was on her side and she saw flares in back of her; that Mr. Topel started back across the street about ten feet in front of her and about four feet from her car; that all of the sudden she heard a car coming and it whizzed and she heard a body going up in the air, "Bang," and said, "Oh, that nice policeman." She testified that she went out and was the first one there, lifted his head off the pavement, his legs were pulled up, the side of his head was bashed in and his eyes had shut and she thought he was dead; that some other cars had stopped and "We dragged him off on the side of the road, I do not know who helped." She testified there were several people there at the scene. She didn't see the defendant there. She further testified that immediately after the accident, Mr. Rocke, who struck Mr. Topel, came and said, "What happened?" He came up to me and I said, "Why, I think you killed a man." The witness testified, "At that, I think he stood around a few minutes, then he ran back and jumped in the car and they drove away. He did not talk to me or tell me who he was and I had the flashlight in my hand, and the flare that Mr. Topel had had, and I put it on the back of that car and the woman that had stopped got the first three letters and this truck driver got the last numbers and he wrote it on the mailbox there." She did not see the defendant Nails at the scene of the accident. She talked to the gentleman there called Rocke. On

cross-examination the witness testified that immediately after Mr. Topel was hit somebody ran to his aid and he was removed from the road and the ambulance came; that there were a good number of people there immediately after the collision and that the ambulance came about a half hour later; that the lady who had pulled up to the side of her car had called the ambulance; that she did not see the car stop that struck Mr. Topel; that she saw that it was stopped later after the accident; that it was stopped about two car lengths across from her on the opposite side of the street; that she did not see defendant get out of the car and that he did not come to the scene of the collision; that while Mr. Rocke came up to her, and was standing around, the woman had gone to get the ambulance.

Mildred Fitzgibbons testified that at about 1:00 a.m. she was on her way home, near Harlem Avenue, and it started to get foggy; that she noticed flares and automobiles on both sides of the highway on North Avenue and pulled off the highway because it was too dangerous to go on; that she noticed an officer setting up flares and that she had gotten out of the car on the north side of the highway and was trying to cross the highway; that the officer told her not to cross, that it was too dangerous; that he went back and shortly afterwards he asked her if she needed any help and she told him she was going to wait for the fog to lift and he told her he would direct her through the fog. A truck driver pulled up and was placing flares, and this officer went to the truck and was lighting a flare in the back, or he had lit one, and the next thing she saw was this car

going east hit the officer and it threw him about 20 feet or more in the air; in answer to the question "How fast was the car going that struck him, have you any idea?" she answered, "Well, I know--well, it seemed to me about 35 or 40. I really don't know, but awful fast for a foggy night like that." She further testified after the car struck Mr. Topel she had "seen a piece of it being handed to one of the officers that was taking the accident report. I saw the car parked on the outside of the highway"; that she ran to call the ambulance and didn't pay too much attention to the car. She further testified that she saw the car that struck Mr. Topel leave the scene of the accident. That she did not see the driver or talk to him; that the vehicle was about 15 or 20 feet from the scene of the accident; it was about 10 minutes or thereabouts when that car left the scene of the accident; that she had never seen the defendant until she saw him in the courtroom last month. On cross-examination she testified that she went for the ambulance immediately after the accident. "When I came back, Mr. Roche's car was still there. I saw the car pull away from the scene. The car was standing at the scene of the accident 10 or 15 minutes possibly, or thereabouts." She further testified that somebody else removed Mr. Topel from the road; that there were others there including the truck driver and a Mr. Johnson and then she ran for help; that when she got back the car was still there; that she did not recall seeing Mr. Roche; that she did not see who drove the car away.

John Boris testified that he was a trucker and that he witnessed the accident about 1:00 a.m. and was standing with the deputy who was hit; that he stopped because there

were several cars off the road at the scene and someone was waving a flashlight, and he got out of the truck; that he could not pull off the road because the truck was heavy and the shoulder was muddy so he stopped the truck on the road and got out with four flares; that he put one in front of the tractor about 25 feet, left the lights on the tractor and truck, and put one flare alongside the trailer and one at the rear and he had one in his hand; that the deputy asked him what was the matter and he said he thought somebody needed help. He said, "no. Everything is under control here," or something to that effect, and put his hand on my shoulder and said, "Well, so long," and "Wham, we got hit"; that he was struck also; that he saw the car that struck them; it was between a '46 and '49 Plymouth and that he thought it was gray; that he was not badly hurt, just had a swollen ankle; that he had a flare in his hand and the deputy had a flare, and he may have had a flashlight but he did not know; that he saw the driver of the car that struck them; that he came over and could not talk. "I talked to him. I called him a few names and he couldn't answer me. I asked him what he was doing on the wrong side of the road. He did not say anything to me. I took his license number off his car. As I was falling I got the last four numbers." He further testified that the man stopped quite a ways down the road on the south side of the road; that he ran across and took the full license number and went back and the man driving the car was standing there; he got out of the car as the witness was going across. Then the cars started pulling up on the road and it was still foggy so "I got a bunch of fusees out of my truck and striking them and handing them to people so they wouldn't get hit

because cars were whizzing by and I was too busy and the next thing I heard was this woman screaming, 'Stop him, stop him.' I saw the driver run toward his car to drive away and I said, 'let him go, I got the license number, and somebody else has it too.' I saw the Plymouth leave the scene of the accident." On cross-examination he stated that the driver of the Plymouth couldn't or wouldn't talk; he didn't look like he could talk; it could have been fright and it could have been something else. He testified that he took his license number but he did not know if he saw him take the license number. He further testified that it was just a matter of a couple of minutes from the time of the collision until "he got back in his car and drove away." That he did not say anything about taking his license number; his car was about a hundred feet away; that when he took the license number he did not see anybody sitting in the car; that "I didn't exactly look for anyone else in the car, but I don't recall seeing anyone else in the car that was silhouetted, with the traffic and cars going back and forth, and had there been anyone sitting up I believe I would have seen them."

Raymond Carl Rocke testified that he lived at North Avenue and Villa in the County, near Villa Park, and that he was acquainted with the defendant and was with him about 1:00 o'clock a.m. on the 7th of April, 1954; that he met him that evening at the Nor-Vil Inn, a tavern located at North Avenue and Villa; that he was tending bar there when defendant came in; that at the time defendant came in he was in a policeman's uniform; that he believed he had the regulation officer's uniform, except for the jacket; that he had on a jacket, tie, gun, trousers, and hat and he believed his badge was on his

jacket, but he did not believe he had his jacket on; that he left the Nor-Vil Inn in the company of defendant in his wife's car, a red tudor 1950 Plymouth; that after they left the Nor-Vil Inn they went west to the Bavaria, another tavern located just east of Main Street, Glen Ellyn; that it was a very foggy night and that the witness was driving the car; that they were at the Bavaria approximately a half hour leaving there right after 1:00 o'clock closing time, and that he was still in the company of defendant driving east after they left the Bavaria. That as they proceeded East, they ran into a heavy fog and the first thing he realized was he hit somebody; that he saw flares on the north side of the street and was traveling about 25 or 30 miles an hour; that it was very foggy; that when he realized he had struck somebody he stopped as soon as he could, got out and pulled the man, who was wearing a Sheriff's officer's uniform, off the road; that defendant got out of the car on the other side and he was out at the time the witness put his jacket under the man's head; defendant took his hat and gun off in the car at the scene of the accident; that the car was parked about 50 feet from where he struck the deputy sheriff; that there were a few people around at the time and there were several cars parked and a truck on the south side of the road also; that he did not talk to anybody at the scene of the accident except to the man he hit; that he was kind of nervous at the time; that he did not give his name and address to anyone there; that he did not show anyone his driver's license; that he did not give his automobile registration number to anyone; that there were houses nearby on both sides of the road; that he saw the deputy sheriff's car

parked on the north side; that after striking the deputy sheriff he got in the car to drive away and defendant said, "Let's go, I'll drive." That the defendant drove the car away from the scene of the accident to the witness' house about 4.2 miles from the scene of the accident. The witness further testified that after they got home, defendant asked him to get him a jacket and he got him a jacket, an army coat, and witness asked his wife to get dressed at the same time and his wife drove the car back to the scene of the accident; and he went to the deputy sheriff who was coming across the street who asked him what happened and he told him that he was the fellow who hit the man; that he told him that defendant was the man who drove the car from the scene of the accident. On cross-examination the witness testified that he remained at the scene just long enough to pull Mr. Topel off the road and put witness' jacket under his head; that defendant got out of the car on the other side, the passenger side, away from the road; that defendant did not go over with him to see Mr. Topel and as far as he knew, he remained at the car; that he did not know where defendant was while witness was taking Topel off the road. That when he got back to the car witness was sitting in the driver's seat and defendant said, "Get over. We've got to get out of here." "I said 'I was going to drive,' and he said, 'No, I'll do the driving.'"

On further cross-examination it was admitted by the witness Rocke that an Information had been filed in the County Court charging him with leaving the scene of an accident and that some six weeks before he plead guilty to same and that no fine or penalty had been imposed and that he had not been

sentenced or punished. During the cross-examination, it was stipulated by the State's Attorney and defendant that there were presently three informations pending in the County Court against the witness, one of which he had plead guilty to, and the other two were still on the call. In answer to questions by defense counsel, "Q Have you been promised any leniency or immunity or consideration in exchange for the nature of the testimony against Mr. Nails?" the witness answered, "No, sir, I was not." "Q You are seeking some consideration on your behalf for your cooperation with the State, is that right?" the witness answered, "No, sir, I am waiting my turn the same as anybody else."

Jack T. Parish testified that on the 7th of April, 1954, he was a deputy sheriff of DuPage County and was on duty and investigated the accident wherein Officer Topel was injured; that he arrived at the scene about 2 minutes after 2:00 a.m.; that he was alone; that he found Officer Topel lying on the pavement on the outer west-bound lane; that there were about 12 or 15 other people present; that when he first arrived he did not find the car that struck Officer Topel; that nobody present knew who struck him; that he encountered the defendant that evening; that the first time he met him was when the witness was standing alongside the squad car and defendant walked up and introduced himself as "Officer Nails of Elmhurst"; that the witness told him who he was; that defendant said that a friend of his was in trouble and he would like to help him; that the witness asked him who it was and defendant got in his car about that time, but refused to tell him who it was, or tell him the nature of the trouble his friend was in. Officer Parish further testified, "Well, to the best of my

recollection I asked him several times who the fellow was, or who the friend was, I didn't know whether it was a man or woman, and he didn't want to tell me. So I simply told him that I couldn't help him if I didn't know the nature of the trouble the friend was in or who it was." Officer Parish had the radiator emblem off the Plymouth car. After his conversation with defendant, he got out of the car and ran back about five cars because he had seen a car pull into line back about five or six cars and the car was a Plymouth about 1946 or 1947 and the front radiator ornament was off of it; that there was a woman behind the wheel; that witness walked up to her and spoke to her and asked her if it was her car; that in the meantime he had seen somebody crouched down in the back seat, sort of lying down in the right hand corner of the back seat; that the witness opened the back door and asked the "fellow" if he was the owner of the car. He said, "Yes." I said, "Were you in the car when it struck the party out here?" He said, "Yes." The witness further testified that during his conversation with the defendant, the defendant did not at any time disclose to the witness who the driver of the car was that struck Mr. Topel; he did not tell the witness he knew anything about the accident; and he did not tell the witness he returned to the scene of the accident after having left it. On cross-examination the witness testified that at the station, defendant stated that he was in the car at the time the collision occurred; that although he made that statement at that time he was not placed under arrest.

Any logical reading and construction of the statute

impels us to the conclusion that the gist of the crime defined in Sections 133 and 135 of the Act in question is in the concealing or attempting to conceal the identity of one involved in an automobile accident wherein personal injuries are sustained. There can be no doubt in reviewing the evidence in this case that this is precisely what the defendant sought to do; i.e. aid and abet Raymond Rocke in fleeing from the scene of the accident without identifying himself as a participant, and subsequently endeavoring to keep the authorities from finding out who precisely caused the accident.

While it is true as contended by plaintiff in error that the testimony of an accomplice is to be received and considered with great caution, and that the courts will not hesitate to reverse a judgment where the evidence of the accomplice is discredited, or where that evidence is so unreasonable, improbable or unsatisfactory as to justify a reasonable doubt of the defendant's guilt, it is also true that a conviction may be sustained on the uncorroborated testimony of an accomplice. *People v Wagman*, 311 Ill. 330; *People v Baskin*, 254 Ill. 509. To the same effect are the earlier cases of *Gray v People*, 26 Ill. 344; *Rider v People*, 110 Ill. 11; *Loehr v People*, 132 Ill. 504. Whether the testimony of an accomplice should be believed is a question for the jury. *People v Wagman*, *supra*; *People v Baskin*, *supra*. In the latter case the Supreme Court sustained the judgment of conviction of the crime of receiving stolen property on the testimony of the thieves, even though the latter contradicted each other as to certain details and although the

accused and his foreman denied that they had any dealings with the thieves except to refuse to buy the goods.

The law in each case must be read as applicable to the particular facts involved. The testimony clearly shows that plaintiff in error was guilty of the offense of aiding and abetting another to commit the crime of leaving the scene of an accident. The proof leaves no reasonable doubt that he drove the principal offender and the car involved in the accident from the scene, and that he knew that the principal had not complied with the statute and was guilty of the offense of leaving the scene of an accident without complying with said statute. The haste of the plaintiff in error in removing himself and the principal from the scene of the crime, his assistance in keeping the principal from reporting the accident, his taking off his hat and gun in the car at the time of the accident, and his asking for and getting an army coat at the principal's home before returning to the scene of the accident, indicate that plaintiff in error was guilty of the crime of aiding and abetting another in leaving the scene of the accident in violation of the statute hereinabove referred to. The uncontroverted testimony of the principal, Raymond Locke, who is admittedly guilty of the crime of leaving the scene of an accident, was that plaintiff in error drove the car from the scene. As such, plaintiff in error aided and abetted in the commission of a crime and is guilty as a principal.

The jury saw and heard the witnesses who testified for the People. It gave credit to their testimony. In doing so we cannot say they were unjustified. It is not contended that the record contains any errors of law, and unless we can say that the jury was not justified in returning a verdict

against the defendant it is our duty not to disturb it.

People v Fortino, 356 Ill. 415; People v Martin, 304 Ill.

494. The Supreme Court has frequently held that the testimony of one witness, even though denied by the accused, may be sufficient to sustain a conviction. People v Fortino, supra; People v Schanda, 352 Ill. 36; People v Schoop, 288 Ill. 44; People v Zurek, 277 Ill. 621.

In our opinion the guilt of the defendant was shown beyond a reasonable doubt, and the judgment of the county court of DuPage County is affirmed.

Judgment affirmed.

Howe R. J. Concurs.

Crosby J. Concurs

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CHARLES REMBERT,

Appellant,

v.

JAMES IRVING, d/b/a WORLD WIDE
AUTO SALES, and ANGELO SPILLER,

Appellees.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO

91A^{2d} 560

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from an order entered January 7, 1955 in the Municipal Court vacating a judgment in his favor in the sum of \$1481.00. The judgment was entered ex parte June 10, 1954, defendants having previously been served with summons and held in default on April 9, 1954. Thereafter, on October 22, 1954, more than four months following the entry of the judgment, defendants filed a motion to vacate.

Plaintiff's complaint of March 16, 1954 charged defendants with fraud and misrepresentation in the sale of a certain automobile. Summons was duly issued and served on defendants personally March 26, 1954. April 9, 1954, the return day of the summons, an order of default was entered against defendants for want of an appearance. June 10, 1954, at an ex parte hearing, plaintiff introduced evidence to prove the allegations of his complaint, at the conclusion of which he had judgment in the sum of \$1481.00 and costs.

October 22, 1954, more than four months after the entry of the judgment and more than six months after defendants were defaulted, they filed a motion to vacate.

1. The first

2. The second

3. The third

4. The fourth

5. The fifth

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10. The tenth

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12. The twelfth

13. The thirteenth

14. The fourteenth

15. The fifteenth

16. The sixteenth

17. The seventeenth

18. The eighteenth

19. The nineteenth

20. The twentieth

October 27, 1954 plaintiff filed a motion to strike defendants' motion on the ground of insufficiency, and on December 14, 1954 defendants filed two affidavits in support of their motion, one by the defendant James Irving, and the other by Dewey Bullock, who is not a party to this suit. Pursuant to hearing on plaintiff's motion attacking the sufficiency of the defendants' motion and supporting affidavits, plaintiff filed his answer to the motion and supporting affidavits and denied all the material allegations contained therein. The case was then set for hearing January 7, 1955 on the merits of the motion to vacate. No witnesses were sworn, no evidence was offered, and no testimony was taken in support of the motion to vacate. Upon a reading of the motion and supporting affidavits and the answer thereto, and over the objections of plaintiff the court sustained defendants' motion and vacated the judgment.

A judgment obtained in the Municipal Court after personal service of summons cannot be vacated after the expiration of thirty days, except under the provisions of section 21 of the Municipal Court Act (Ill. Rev. Stat. 1953, ch. 37, sec. 376), which provides in part as follows: "If no motion to vacate . . . any such judgment . . . shall be entered within thirty days after the entry of such judgment, . . . the same shall not be vacated . . . excepting upon appeal or by a suit in equity, or by a petition to said municipal court setting forth grounds for vacating . . . the same, which would be sufficient to cause the same to be vacated . . . by a suit in equity: Provided, however, that all errors of

fact in the proceedings in such case, which might have been corrected at common law by the writ of error coram nobis may be corrected by motion, or the judgment may be set aside, in the manner provided by law for similar cases in the circuit court."

Defendant's motion to vacate, filed more than thirty days after the entry of the judgment and purporting to set forth facts which, if known to the court, would have prevented the rendition of the judgment, must necessarily have been filed under section 21 either as a motion in the nature of a writ of error coram nobis or as a petition in the nature of a bill of equity,

The rule is well settled that a court of equity will grant relief against a judgment where a party, because of fraud, accident, mistake, or the act of the opposite party, was prevented from availing himself of his defense. Stade v. Stade, 315 Ill. App. 136. It is equally well settled that equity will not interfere where the judgment was entered because of defendant's negligence in failing to interpose a defense. Cairo and St. Louis R. R. Co. v. Holbrook, 92 Ill. 297, Mohr v. Messick, 322 Ill. App. 56; Gustafson v. Lundquist, 334 Ill. App. 287. In the latter case the court pertinently observed: "When a party is sued and process duly issued and that process has been regularly served upon the defendant as provided by law, he must be governed by the law and rules of practice and must present his defense if he desires to contest the demand of the plaintiff for judgment. (Marnik v. Cusak, 317 Ill. 362, 365.) A motion of the character here presented seeking to set aside a final

[illegible]

judgment of a court having jurisdiction of the parties and subject matter is one of serious import and if treated lightly, threatens the stability of our courts. (Ccnard v. Camphouse, 230 Ill. App. 598.)"

In the instant case, defendants' motion and supporting affidavits alleged no reason why they failed to file an appearance in the case on or before the return day, April 9, 1954. Irving's affidavit merely states that on August 12, 1953 plaintiff purchased a Chrysler automobile from defendant and that the sale was made by Dewey Bullock, one of the salesmen of World Wide Auto Sales; that subsequently, in the month of June 1954, affiant received a letter from the state's attorney's office requesting him to appear there with reference to a complaint lodged against him and the automobile agency by the plaintiff Rembert; that in response to the letter he called on the assistant state's attorney in charge of the case and paid the sum of \$57.00 to Rembert in full settlement of any and all claims against defendants; that this sum was paid at the suggestion of the assistant state's attorney, whose name is unknown to affiant; that only the assistant state's attorney and plaintiff were present; that plaintiff gave affiant certain repair bills marked "paid"; that the transaction "settled the matter to the complete satisfaction of the said Charles Rembert"; that thereafter, when defendants were served with summons, affiant was advised by Bullock that he had talked with Rembert who stated that the matter had been straightened

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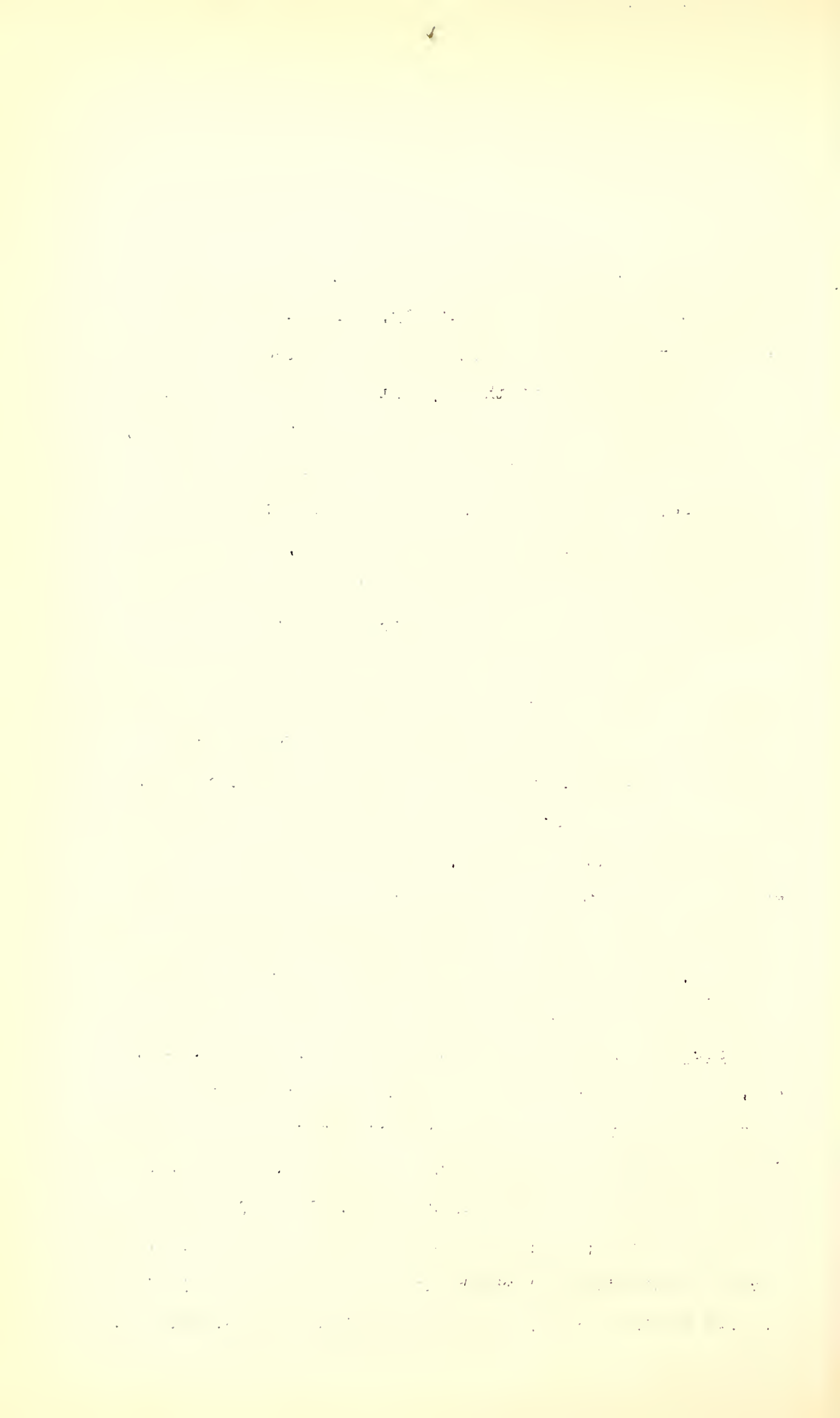
out at the state's attorney's office, and that defendants should forget about the summons as the case would be dismissed; and that Charles Rembert was satisfied with the settlement. Bullock's affidavit is to the same effect.

It should be observed that neither of these affidavits alleged any reason why defendants failed to file an appearance in the case on the return day. Bullock's affidavit alleges only that at some unspecified time after plaintiff and Irving had appeared in the state's attorney's office in the month of June 1954, plaintiff stated to him that the case would be dismissed; it failed to state that this alleged statement of plaintiff was made prior to June 10, 1954, the date on which the judgment was entered. The affidavit of James Irving was deficient in the same respect; it states only that at some unspecified time during or after the month of June 1954 he was advised by Bullock, his agent, that he had talked with plaintiff who had told him that the case would be dismissed. Since such statement, if made by plaintiff, was made during or after the month of June 1954, there is nothing in the affidavit assigning any reason for defendants' failure to file an appearance April 9, 1954, the return day of the summons; nor is there any reason assigned for failure of defendants to take any action to set aside the default order of April 9, 1954. In the circumstances it must be logically concluded that the failure to appear and defend in apt time was the result of defendants' own negligence; their pleadings

affirmatively show that plaintiff was not in any way responsible therefor. Accordingly, defendants' motion was without merit and should have been denied.

Defendants treat the payment of \$57.00 to plaintiff as in the nature of an accord and satisfaction. However, this was merely a refund of the cost of repairs to the automobile. Apparently there was no discussion at the time of said payment, or at any other time, relative to the settlement of the difference in the value of the new automobile, upon which this suit is predicated.

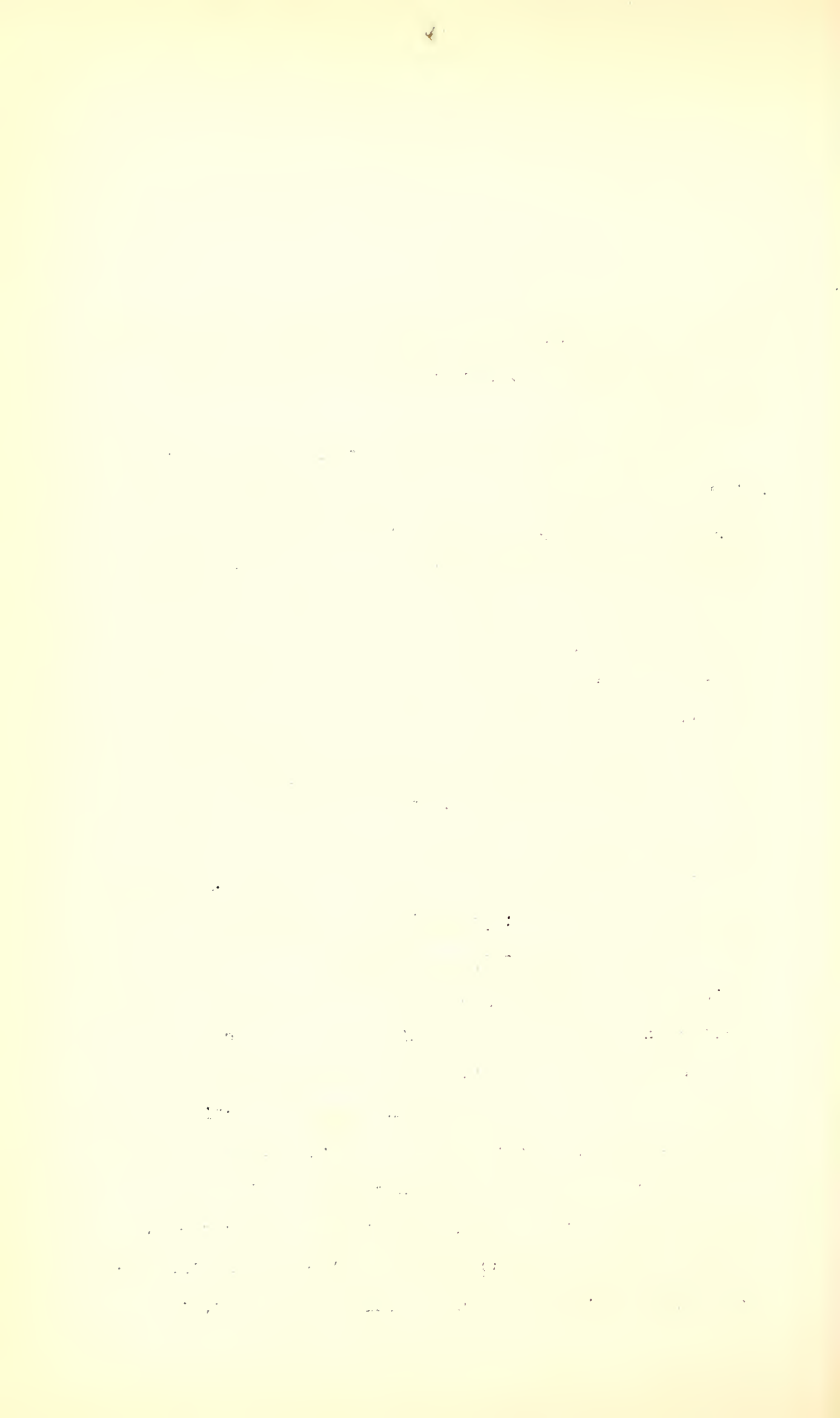
Defendants filed no brief on appeal, but their counsel argued the case orally, and subsequently filed a typewritten memorandum in support of their argument. The principal contention advanced by counsel is that the order vacating the original judgment after the expiration of thirty days was not final and appealable, and various cases are cited which, it seems to us, can readily be distinguished from the case at bar. Wolf v. Proviso Hospital Association, 309 Ill. App. 479, involved an appeal from an order vacating a judgment on motion made within thirty days. General Electric Co. v. Gellman Manufacturing Co., 318 Ill. App. 644, had to do with an appeal from an order entering a default and not from an order vacating a judgment. Chicago Catholic Workers' Credit Union v. Rosenberg, 346 Ill. App. 153, considered the vacation of a conditional judgment in a garnishment suit; there the court held that an order vacating a conditional judgment which could be vacated at any time was not a final order. Town of Magnolia v. Kays, 200 Ill.



App. 122, did not involve any order vacating a judgment but was an appeal from an order entering a judgment for defendant.

Under the established rule in this state the order in the instant proceeding is final and appealable. In The People v. Union Trust Bank, 406 Ill. 208, where a similar question was raised, the court said: "Although not specifically so designated, the petition to vacate the judgment . . ., having been filed more than thirty days after the judgment was entered, will be treated as a motion in the nature of a writ of error coram nobis. (Jerome v. 5019-21 Quincy Street Building Corp., 385 Ill. 524.) A proceeding by motion in the nature of a writ of error coram nobis is a new action and an order disposing of the motion is final and appealable. (Cowen v. Harding Hotel Co., 396 Ill. 477; Christian v. Smirinotis, 388 Ill. 73.)" See also In re Estate of Knazek, 1 Ill. App. 2d 387, wherein both the Union Trust Bank and the Jerome decisions are cited in support of the holding that "a proceeding by motion in the nature of a writ of error coram nobis under section 72 of the Civil Practice Act is a new action and the order disposing of such a motion is final and appealable."

Since we hold that defendants were negligent in failing to appear and defend against plaintiff's claim, and that the motion and supporting affidavits are insufficient under section 21 of the Municipal Court Act, the



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order vacating the judgment must be reversed; the stability and integrity of judicial proceedings requires that this be done.

The order vacating the judgment of June 10, 1954 is therefore reversed.

ORDER REVERSED.

BURKE and NIEMEYER, JJ., CONCUR.

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46739

HARRY BRAININ,

Appellant,

v.

GREAT LAKES SUPPLY CORPORATION,
a Delaware corporation,
Defendant,

LUKE R. NEIP,

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

91.A.2d.300

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The plaintiff, Harry Brainin, a stockholder in Great Lakes Supply Corporation (hereafter referred to as the corporation), brought suit to restrain defendant Luke R. Neip from assigning, transferring or otherwise disposing of 1000 shares of common stock of the corporation, to enjoin it from transferring a certificate evidencing the 1000 shares on its stock record books, and for other equitable relief. The defendant corporation answered; the defendant Neip interposed a motion to strike the complaint. The trial judge sustained the motion to strike and dismissed the suit insofar as it pertained to the defendant Neip. No evidence was adduced upon the hearing. Plaintiff appeals from the order entered.

Great Lakes is a Delaware corporation with its principal place of business in the City of Chicago. Neip at the time of the filing of the complaint was its president, and a member of its board of directors; plaintiff is the

-2-

owner of approximately 40 per cent of the outstanding and issued common stock of the corporation. On October 1, 1953 Neip became one of the signatories of the following document.

"To: Great Lakes Supply Corporation:

"The undersigned, in consideration of the assistance given them in securing the shares of common stock of Great Lakes Supply Corporation recited opposite our signature, hereby severally agree that if at any time within ten (10) years from the date hereof, anyone of the undersigned shall sell said shares, in part or in whole, that said shares shall be first tendered and/or offered to you at the price of \$20.00 per share and you shall have thirty (30) days to accept or reject said tender and/or offer.

"The stock certificates shall be registered in our respective names and shall bear the following legend:

"'Subject to the terms of an agreement dated October 1, 1953 on file with Great Lakes Supply Corporation.'

"These recitals shall be binding on our heirs and/or executors and/or our assigns.

Signed:

Karl H. Shaffer	100 shares
Warren A. Behn	100 shares
Luke R. Neip	1000 shares
Francis P. Gornick	100 shares
John A. Cmar	300 shares
James E. Kelly	295 shares."

In its answer, the corporation averred that the agreement relied upon by plaintiff was " . . . negotiated, prepared and executed by the parties who signed it, the corporation itself, through its board of directors or otherwise, having had nothing to do with its negotiation, preparation or execution. The corporation received a copy thereof several months after October 1, 1953." It also made the following averment: "Answering paragraph 7, defendant says that its stock is not listed or regularly traded in on any market and does not have, so far as defendant knows, an established market value; nor has the board of directors of defendant determined, or had occasion to determine, the possibility or advisability of purchasing the stock referred to in said paragraph if it were offered to it."

In August or September 1954 Neip and the other signatories executed an instrument purporting to rescind, revoke and supersede the agreement. Upon being apprised of these facts, plaintiff on October 14, 1954 sent a notice in writing to the defendant corporation demanding that no transfer of the 1000 shares of stock be permitted on the books, and stating that an attempt to rescind the agreement was a violation of the vested rights of the corporation as a third-party beneficiary.

Plaintiff contends that the stock has a fair market value of \$33.00 per share and a book value of \$60.00 per share; that if the market value be adopted as the standard, a sale to a third party by Neip of his 1000

shares would result in a loss of \$13,000.00 to the corporation and approximately 40 per cent of that amount, or \$5000.00, to the plaintiff; that if book value be adopted as the measure of damages, such a sale would result in a loss to defendant corporation of approximately \$40,000.00 and to plaintiff of approximately \$16,000.00; and that the corporation has cash and a net worth more than sufficient to enable it to exercise the option agreement. The corporation takes a neutral position. It states in its answer that "neither by resolution of its stockholders nor by resolution of its board of directors has the corporation taken any action or determined any policy as to purchase of its own shares of common stock." Neip takes the position, as indicated in the several reasons assigned in support of his motion to strike, that the agreement ~~he~~ entered into with certain other individuals, not parties to this suit, was solely for the benefit of the parties signatory to the agreement and did not create or make the corporation a third-party beneficiary; also that the corporation which gave no consideration, and neither accepted nor relied upon the contract, lost no rights it may have had upon the cancellation and revocation of the agreement by mutual consent of the defendant and the other parties thereto; and that the corporation has not suffered, nor will it suffer, any financial detriment.

It must be conceded by reason of the corporation's answer that it had nothing to do with the negotiation, preparation or execution of the agreement, that it never

accepted the contract or materially changed its position in reliance thereon. In the circumstances the third party [the corporation] has no rights, and the parties may cancel or rescind. It was so held in Commercial National Bank v. Kirkwood, 172 Ill. 563, wherein the court said that "a mere agreement between two for the benefit of another does not create a completed contract. Until acceptance by the third party there is no privity of contract between him and the promisor." This case was followed in Betts v. Ketchum, 168 Ill. App. 270.

Moreover, the stock was not required to be offered, and, if not offered, the beneficiary could not compel defendant to sell; consequently the rescission by the parties as alleged in the complaint is the non-performance of the offering for sale, and the beneficiary has no enforceable right. See Corbin on Contracts, volume 4, section 816, page 261. In his brief plaintiff quotes section 142, volume I, of the Restatement of the Law of Contracts with reference to the power of a promisor and promisee to rescind, and relies on Bay v. Williams, 112 Ill. 91, in support of his position. That case involved the assumption of a mortgage and, unlike the instant proceeding, presented a creditor relationship.

In the instant case there is no allegation that the corporation wants the stock. The argument that a stockholder may sue if the corporation fails to act is grounded upon cases wherein the directors were charged

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with fraud or breach of trust. There are no charges of that kind in the instant proceeding.

For the reasons indicated, we hold that the order dismissing the second amended complaint in so far as it pertains to the defendant Neip should be affirmed, and it is so ordered.

ORDER AFFIRMED.

BURKE and NIEMEYER, JJ., CONCUR.

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91.A. 2d 561

46835

JOHN KAMINSKI, Sr., and VICTORIA
KAMINSKI, his wife,

Plaintiffs,

v.

JOSEPH RYMEK and WALTER OHLER;
VIOLET RYMEK and VIRGINIA OHLER, as
co-trustees under Trust Agreement
dated March 30, 1954, as Trust #1-A,

Defendants.

VICTORIA KAMINSKI,

Appellant,

v.

WALTER OHLER, VIOLET RYMEK and
VIRGINIA OHLER, as co-trustees under
Trust Agreement dated March 30, 1954,
as Trust #1-A,

Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

John Kaminski and Victoria, his wife, filed a complaint, consisting of two counts, against Joseph and Violet Rymek, husband and wife, and Walter and Virginia Ohler, also husband and wife. In Count I John Kaminski, the husband, sought to recover damages from one of the owners of a tavern for an alleged assault and battery; that cause is pending. In Count II Victoria Kaminski, the wife, sought to recover damages under the Dram-Shops Act (Ill. Rev. Stat. 1955, ch. 43, par. 135) for deprivation of support, from the co-owner of the tavern and from the owners of the premises.

Defendants filed their motion to strike Count II, which was sustained; it was stricken with prejudice; and defendants were dismissed as parties thereto. Plaintiffs appeal.

The question presented is whether Count II of the complaint, as amended, states a good cause of action. It is alleged therein that plaintiff Victoria Kaminski is the wife of John Kaminski; that on and prior to September 28, 1954 Joseph Rymek and Walter Ohler were owners of a tavern at 4058 West 47th Street in Chicago; that on said date Violet Rymek and Virginia Ohler held title to said premises, as trustees, and rented the property to Walter Ohler, or permitted its occupancy by him, with the knowledge that alcoholic liquors were to be sold in the building; that on September 26, 1954 Walter Ohler sold or gave to Joseph Rymek, in the tavern, alcoholic liquor which caused his intoxication, and that while intoxicated and in consequence thereof, he struck plaintiff's husband John Kaminski, inflicting injuries for which plaintiffs seek redress.

The motion to strike alleged that Joseph Rymek, the intoxicated party, is an owner of and operating the tavern business with Walter Ohler on the premises which are owned by defendants Violet Rymek and Virginia Ohler, and particularly that Rymek, the intoxicated party, owns, operates and controls the tavern business alleged to be responsible for the sale or gift of the liquor complained of.

In the trial court, counsel for the parties predicated their argument on the theory that the relationship

between the defendants Joseph Rymek and Walter Ohler was that of a co-partnership, and presumably this is a conceded fact; but regardless of whether they were co-owners or co-partners, the law is well settled that there cannot legally be consummated, as between them, a "gift" or a "sale" of alcoholic liquor, within the meaning of the context--"by selling or giving alcoholic liquor"--and wherever in the past recovery has been had under this act, a "gift" or a "sale" has necessarily been involved. It is difficult to conceive how Joseph Rymek, as a co-partner, could either purchase or be made a gift of specific partnership property by Walter Ohler, his co-partner, during the term of the partnership.

Gunderson v. First National Bank of Chicago, 296 Ill. App. 111, was a suit against the owner of a building where a tavern was located to recover under the Dram-Shops Act for personal injuries. There the tavern operator, who assailed plaintiff, helped himself to his own liquor, and the court held that he was neither "selling or giving alcoholic liquor" to plaintiff's assailant within the contemplation of the statute. The court pertinently observed that "in order for the plaintiff to recover in this cause it was incumbent upon him to prove, among other things, that the operator of the tavern located on the premises owned by defendant sold or gave alcoholic liquor to plaintiff's assailant It is clear that Monaco [the tavern operator who assailed plaintiff] could make neither a sale nor a gift of the liquor to himself . . ." (Emphasis supplied.) The rationale of the

Figure 1. The effect of the concentration of the *Agrobacterium* suspension on the transformation efficiency of *Agrobacterium* strains.

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court's finding is that either the elements constituting a "gift" or a "sale" were lacking, or that by statutory construction an owner of a tavern business who consumes his own alcoholic liquor is not within the contemplation of the statute. In the instant case, if plaintiffs' allegations be assumed as true, the defendant Joseph Rymek consumed alcoholic liquor from the tavern business, and being a co-partner, there could be neither a "gift" nor a "sale" of the liquor to him on the part of his co-partner Ohler. The impossibility of such a transaction is apparent. The liquor located on the tavern premises could be classified as specific partnership property, and Rymek, by virtue of his status as co-partner, has an interest, as owner in common of the entire liquor supply, identical with his co-partner Ohler; both of them as co-partners owned the liquor consumed; neither one can be said to have owned a specific portion of it.

The Dram-Shops Act is a statute of highly penal character, providing rights of action unknown to the common law, and "should, according to well understood canons, receive a strict construction." Cruse v. Aden, 127 Ill. 231. The courts of this state have generally so construed it. Howlett v. McGarvey, 334 Ill. App. 512.

The authorities are in accord that under the express language of the act there is the necessity for a "gift" or a "sale" of alcoholic liquor from the owner of the tavern business, his agents or employees to the intoxicant who in turn is the cause of injury or damage to another, before a

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cause of action under the statute exists. The meaning of "selling" or "giving" has a definite connotation in the eyes of the law. Plaintiffs cite no cases holding that one of two co-partners of a tavern business who consumes a portion of the alcoholic liquor belonging to the business comes within the provisions of a "gift" or a "sale" as contemplated by the statute.

Accordingly, we are of the opinion that the order of the trial court was proper, and it is therefore affirmed.

ORDER AFFIRMED.

BURKE AND NIEMEYER, JJ., CONCUR.

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46843

PEOPLE OF THE STATE OF ILLINOIS, }
Defendants in Error, }
v. }
RALPH NEAL, }
Plaintiff in Error. }

91A^{2d} C2
ERROR TO
MUNICIPAL COURT
OF CHICAGO

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Ralph Neal brought writ of error to review a judgment of the Municipal Court of Chicago, rendered pursuant to a trial without jury, finding him guilty of violating section 36 of the Uniform Act Regulating Traffic on Highways (Ill. Rev. Stat. 1955, ch. 95 1/2, sec. 133) concerning accidents involving death or personal injuries.

The sole question relates to the sufficiency of the information under which defendant was tried and convicted. It was brought "In the name and by the authority of the People of Chicago Park District, State of Illinois," and in substance it alleged that at a certain time and place defendant "did then and there unlawfully violate Section 36 U. A. R. T. Acc. Involv. Death of the (M. V. L.) (U. A. R. T.) (of the State of Illinois) by Y37." The court found defendant guilty and entered judgment on the finding, ordering him to pay a fine of \$500.00 and costs.

Section 33 of article VI of the State constitution provides that all process shall run "In the name of the People of the State of Illinois; and all prosecutions shall be carried on: In the name and by the authority

of the People of the State of Illinois." The instant proceeding charged violation of a State statute. The information brought "In the name and by the authority of the People of Chicago Park District, State of Illinois" does not comply with the constitutional provision. Instead of being brought "In the name of the People of the State of Illinois," as the constitution provides, it was brought by the authority of the Chicago Park District, a municipal corporation, and was therefore void.

In People v. Whitmer, 243 Ill. App. 244, where this precise question was considered, the court quoted from several Illinois decisions holding that an information will be found void if it is not technically correct, and pointed out that there are no cases to the contrary. The court's excerpt from Hay v. The People, 59 Ill. 94, is particularly relevant to the instant case: "'The motion to quash should have been sustained. The information does not run, 'In the name and by the authority of the People of the State of Illinois,' as required by the constitution. These words cannot be dispensed with. They constitute matter of substance, and advantage can be taken of their omission, in arrest or on error. This proceeding is a prosecution, and the language of the constitution must be used, as in indictments.'" See also the earlier case of Johnson v. The People, 113 Ill. 99.

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It is further urged by defendant that the information filed against him was not specific in that it charged no particulars in the manner in which section 36 was violated. We think the point is well taken and sustained by the decisions in this state. The People v. Trumbley, 252 Ill. 29; The People v. Green, 368 Ill. 242; The People v. Flynn, 375 Ill. 366.

For the reasons indicated, the judgment of the Municipal Court is reversed.

JUDGMENT REVERSED.

BURKE and NIEMEYER, JJ., CONCUR.

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46706

PEOPLE OF THE STATE OF
ILLINOIS,
Defendant in Error,
v.

ERROR TO CRIMINAL COURT,
COOK COUNTY.

SAM GAROFOLO and CHRIST
CHIARMONTE,
Plaintiffs in Error.

JUDGE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendants seek the reversal on writ of error of a judgment sentencing them to the penitentiary on conviction of a charge of conspiracy to make, forge and counterfeit a large number of cigarette tax meter stamps; to cause and procure the forgery and counterfeiting of such cigarette tax meter stamps; to utter, publish, tender and pass as true and genuine a large number of false, forged and counterfeited cigarette tax meter stamps, well-knowing the same to be false, forged and counterfeited; to sell or offer to sell for money to divers persons engaged in the business of reselling cigarettes, divers numbers of original packages of cigarettes as defined in the Illinois Cigarette Tax Act, each package having affixed there- to a false, forged, counterfeited and spurious cigarette tax meter stamp, well-knowing the stamps to be false, forged, counterfeited and spurious.

There is no conflict in the evidence. Defendant Garofolo was president of the Villa Park Wholesale Tobacco Company (hereinafter called the Villa Park Company), an Illinois corporation having its office in Villa Park, Illinois. The corporation was a licensee of the Department of Revenue of the State of Illinois as distributor of cigarettes.

Stamp meter No. 23971 issued to the company had a definite, special lay-out plan that had been adopted by the State of Illinois and was confined solely to that meter. The number 23971 was assigned only to the company. Defendant Chiarmonite worked for Garofolo in Villa Park for some time prior to September 1950, when he began doing business as the Christy Tobacco Company at 3458 West Fullerton avenue, Chicago, taking over as customers at least eight retail cigarette dealers in Chicago who had previously been customers of the Villa Park Company. He bought cigarettes from Garofolo and from other dealers. He delivered to Garofolo many checks received from the prior customers of Garofolo, and these checks were deposited to the credit of the Villa Park Company or cashed at the bank in which Garofolo's company had its account. In September 1950 the endorsement of the Christy Tobacco Company on not to exceed ten of these checks was made by Garofolo. There is no evidence of the disposition of the proceeds of checks which were cashed at the bank. This practice continued until November 25, 1951, when state police, armed with search warrants, made simultaneous searches of the premises of the Villa Park Company and the Christy Tobacco Company. In the premises of the Villa Park Company a number of cigarettes properly stamped, and some unstamped, were found. Stamp meter No. 23971 was delivered to the authorities. In the Christy Tobacco Company premises a large number of cartons of cigarettes bearing spurious and counterfeited stamp No. 23971 were found, together with a considerably smaller

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number of cartons of cigarettes bearing the genuine stamp No. 23971.

Nick Montalbano drove an automobile truck, delivering cigarettes for Garofolo until September 1950 when he performed the same service for Chiarmonite. He testified as a witness for the people that while working for Chiarmonite he received no orders from Garofolo; that he picked up cigarettes for Chiarmonite from dealers other than Garofolo, and that other dealers delivered cigarettes to the Christy Tobacco Company premises. The truck which he operated bore on its side the initials of the Villa Park Company. This truck was sold by Garofolo to Chiarmonite in February 1950, and later sold by him to Montalbano. Montalbano ceased driving for Chiarmonite in the summer of 1951. He had not completed payments on the truck and left it with Chiarmonite.

Evidence was introduced on behalf of defendants to show that the Villa Park Company bought from the state sufficient stamps to cover the cigarettes purchased and sold by it. Stuart J. Madenford, an employee of the company which manufactured the stamp meters used by the State of Illinois, testified: "Anyone who wanted to duplicate a particular stamp could just purchase a carton at any store and endeavor to duplicate it."

The conviction of the defendants rested wholly on circumstantial evidence. As stated in The People v. Widmayer, 402 Ill. 143, 146-147:

"It is the rule with reference to the sufficiency of circumstantial evidence to convict, that it must be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion. It must produce a reasonable and moral certainty that the accused and no one else committed the crime. His guilt must be so thoroughly established as to exclude every other reasonable hypothesis. (People v. Yaunce, 378 Ill. 307; People v. Crego, 395 Ill. 451.) To warrant conviction of a crime on circumstantial evidence, the proof must be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion and producing a reasonable and moral certainty that the accused and no one else committed the crime. People v. Grizzel, 382 Ill. 11."

There is no evidence that either of the defendants made or procured the making of the spurious or counterfeited stamps. The testimony of the employee of the maker of the stamp meters used by the State of Illinois that anyone could just purchase a carton of cigarettes at any store and endeavor to duplicate the stamp, is evidence that the spurious and counterfeited stamps on the cigarettes found on the premises of the Christy Tobacco Company could have been made without the knowledge or consent of either of the defendants. There is no evidence that either defendant knew that the stamps on the cigarettes in the possession of Chiarmon~~te~~^{ti} were spurious or counterfeit. There is no legitimate inference of guilty knowledge from the mere possession of the cigarettes (Price v. United States, 70 F.2d 467, 468), or from a sale or offer to sell cigarettes bearing a spurious or counterfeit stamp (United States v. Litberg, 175 F.2d 20, 23).

Furthermore, there is no evidence of an unlawful combination between the defendants unless it may be inferred from the sale of cigarettes by Garofolo to Chiarmon~~te~~^{ti} after September

1950 and delivery of the checks payable to the Christy Tobacco Company, hereinbefore mentioned, to Garofolo and the deposit of the proceeds in the account of the Villa Park Company. So far as the evidence shows, the proceeds of the few checks cashed at the bank may have been turned over to Chiarmonite, the endorsement of the Villa Park Company being a mere accommodation necessary to enable Chiarmonite to get the money on these checks. There is no evidence that he had a bank account of his own. It may well be, as defendants suggest, the remaining checks were delivered to Garofolo in payment for cigarettes sold by him to Chiarmonite. If so, the transactions in respect to the checks are consistent with the innocence of the defendants and therefore no evidence of guilt, even though as the trial court said, in considering a motion for a directed verdict, "If these defendants were in a criminal conspiracy to defraud the state, why they would have done the very thing they showed they did do here."

The evidence does not meet the tests for conviction on circumstantial evidence hereinbefore stated, and the judgment must be reversed. This conclusion makes unnecessary the consideration of other points raised by defendants.

Judgment reversed.

Friend, P. J., and Burke, J., concur.

46754

JOSEPH BAGLIERI,

Appellee,

v.

R. R. HESSLING and JUST RENT A
CAR COMPANY,

Defendants.

On Appeal of JUST RENT A CAR
COMPANY,

Appellant.

APPEAL FROM

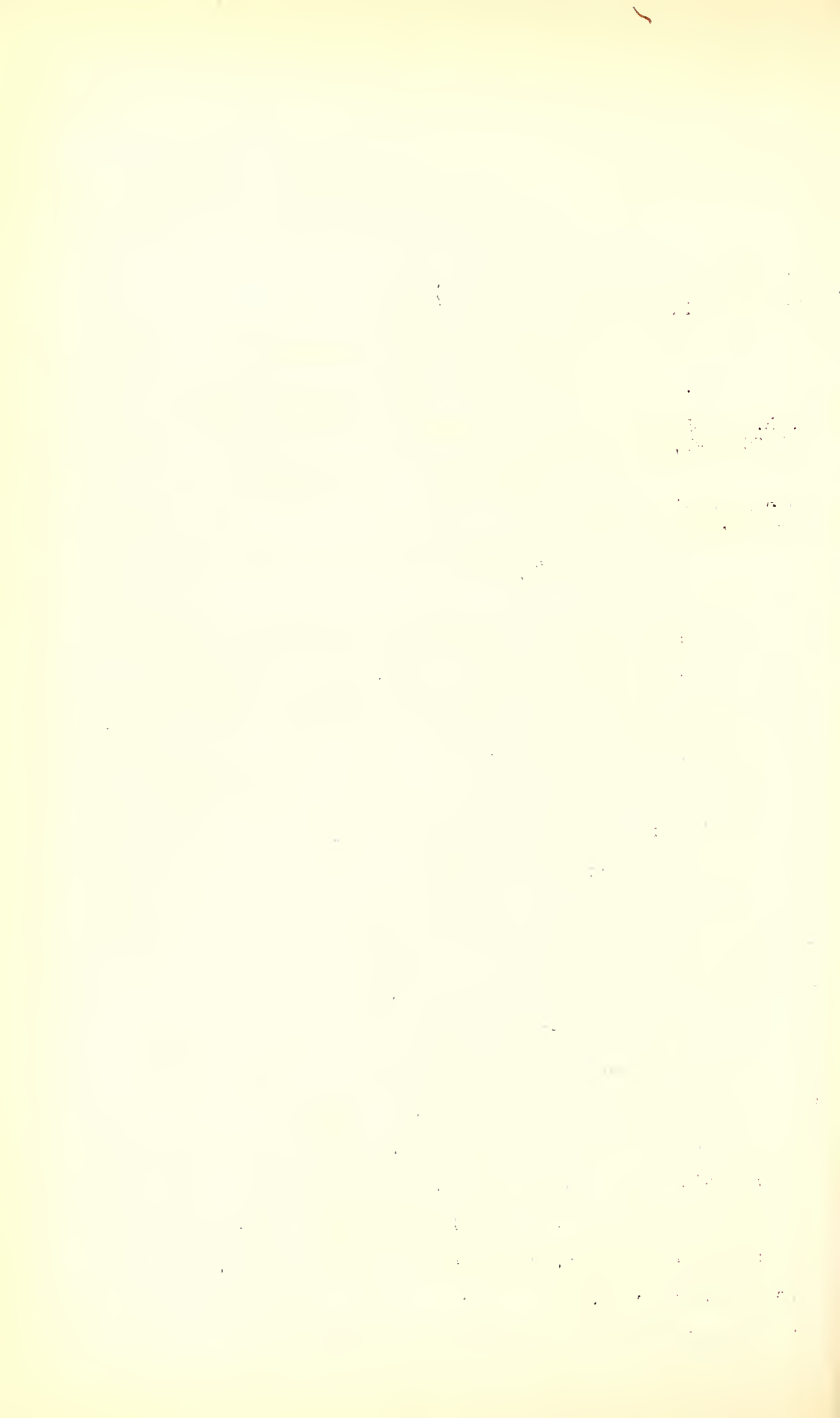
SUPERIOR COURT

COOK COUNTY

JUDGE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant Just Rent A Car Company, a corporation, appeals from an order denying its motion to vacate a judgment by default for \$5,000 entered against it in plaintiff's action for injuries sustained in a collision between plaintiff's automobile and an automobile of defendant rented, leased to or permitted to be used by the co-defendant, R. R. Hessling. The principal ground relied upon for the vacation of the judgment is the alleged failure of the complaint to state a cause of action.

Plaintiff alleges in paragraph 2 of his amended complaint that "the defendant Just-Rent-A-Car, Company, a corporation, rented or leased to, or permitted the use of a certain automobile by Richard R. Hessling, co-defendant, and the said co-defendant did operate and drive said automobile, the property of this defendant, Just-Rent-A-Car, Company, a corporation, with the latter's knowledge, permission and consent." There is no allegation that Hessling was an agent or employee of the defendant-owner of the



-2-

automobile. The relation between the defendants, therefore, is that of bailor and bailee, and the bailor is not liable for the negligence of the bailee. Singer v. Cross, 257 Ill. App. 41; Dean v. Ketter, 328 Ill. App. 206; Mosby v. Kimball, 345 Ill. 420. There being a total failure to state a cause of action, the insufficiency of the complaint may be attacked at any time. Owens-Illinois Glass Co. v. McKibbin, 385 Ill. 245, 250.

The court erred in refusing to vacate the judgment, and the order appealed from is reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

FRIEND, P. J., and BURKE, J., CONCUR.

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46768

THE FIRST NATIONAL BANK OF
CHICAGO, a corporation, as
Trustee under the Will of
KATE E. HERBERT, deceased,

Appellee,

v.

BETTY GERRETSEN HERBERT and
AUGUST K. HERBERT,
Defendants.

On Appeal of BETTY GERRETSEN
HERBERT,

Appellant.

9 I.A. 564^{2d}

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

JUDGE NIEMEYER DELIVERED THE OPINION OF THE COURT.

The defendant Betty Gerretsen Herbert, hereinafter called defendant, appeals from a decree in a suit brought by the trustee under the will of Kate E. Herbert, deceased, to construe paragraph (j) of article Fifth of the will of decedent.

We need consider only article Fifth of the will, whereby the testatrix disposed of "All the rest, residue and remainder of my Estate" as follows: 31 per cent thereof to designated beneficiaries absolutely; 2 per cent thereof to the Trustees of Uhlich Orphan Home, in trust, and the remaining 67 per cent thereof to plaintiff, The First National Bank of Chicago, as trustee, of four separate funds or estates in trust of 23, 5, 23 and 16 per cent of the rest, residue and remainder of the estate.

The paragraph of the will involved herein reads as follows:

"(j) To my Trustee hereinafter named, Sixteen (16%) Percent thereof, in trust nevertheless, and upon the uses and trusts, and for the following purposes, viz:

To take and hold said Fund and Estate in Trust, to collect and receive all rents, issues and profits or other income thereof, and after paying the necessary expenses of the Trust, to pay all the net income thereof in regular quarterly payments to my son, Martin B. Herbert, during his life; upon his death, or in case he shall predecease me, I direct my Executor or Trustee, as the case may be, to pay over to the wife of my son, Martin B. Herbert, viz: Betty Gerretsen Herbert, Five (5%) Percent of my Estate.

I direct my Executor or Trustee as the case may be to pay over the balance of said legacy or Trust Estate to my grandson, August K. Herbert, in case he shall be living. In case he shall predecease me or shall die prior to the time he shall be entitled to receive said legacy, leaving him surviving a child or children, then and in such case, said legacy shall be divided equally between such child or children, otherwise, it shall be paid to the Trustees of the Uhlich Orphan Home, to be held by them upon the same terms and conditions as set forth in Paragraph (d) of Section Five hereof."

Martin B. Herbert, the son, died after the death of the testatrix. The trial court decreed that defendant, his widow, was entitled to only 5 per cent of the "fund and estate in trust" created by paragraph (j); that is, 5 per cent of 16 per cent of the residuary estate. Defendant contends that she is entitled to 5 per cent of the entire residuary estate.

The intention of the testatrix is to be determined, if possible, by the language of the will. McDonough Co. Orphanage v. Burnhart, 5 Ill.2d 230, 239. In our opinion the intent of the testatrix is clearly stated in the will. By paragraph (j) she created a life income for her son, Martin B. Herbert, and provided that upon his death the trustee should pay over to his wife, the defendant herein, "Five (5%) Percent of my Estate," and "the balance of said legacy or Trust Estate" to

-3-

the grandson of testatrix, August K. Herbert, in case he shall be living. The further provisions for the disposition of the balance of this legacy or trust estate in the event the grandson should die before he became entitled to receive said balance, is immaterial on this appeal. The bequest of "Five (5%) Percent of my Estate" can only refer to 5 per cent of the residuary estate disposed of in article Fifth of the will. We find nothing in the context of the will requiring or authorizing the rejection of the plain purport and meaning of the term "my Estate" and construing it as the "fund and estate in trust" created by paragraph (j).

The decree is reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

FRIEND, P. J., and BURKE, J., CONCUR.

46778

HERBERT ROTHENBERG and BERNICE
ROTHENBERG, d/b/a WABASH FROZEN FOODS,
Appellants,
v.
MONARCH REFRIGERATION COMPANY OF
CHICAGO, a corporation, and THOMAS J.
KANE and MRS. THOMAS J. KANE, a/k/a
MARION O. KANE PROPERTIES,
Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

91A.565

JUDGE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiffs appeal from a judgment for defendants entered on trial by the court without a jury in their action for damages to egg crates stored on the first floor of defendants' building caused by the breaking of a pipe in the sprinkler system maintained by defendants on the second and higher floors of the building.

The charge of negligence is general, plaintiffs basing their claim on the doctrine of res ipsa loquitur. Defendants' principal defense is an alleged exculpatory agreement whereby defendants would not be liable for any negligence in the operation of the building. This agreement is based wholly on the testimony of the renting agent of defendants, who testified in respect to the leasing arrangement made with the plaintiff Herbert Rothenberg, as follows:

"The first time I saw him was on Hubbard Street in front of the building and I talked to him about leasing the premises. He said he would like to lease the space and I told him if he wanted to take the place in the condition that it was I would be glad to entertain a proposition for renting. I told him that we had no accommodation, no lights, no heat, no water, no toilet facilities, no elevators in the

building and could give him no accommodations at all with the exception of room where he could store his egg cases. I told him if he wanted to take it in that condition he could and I would be glad to rent it to him for \$100 a month. There was to be no lease and there was to be no agreement of any kind, but he was to use it as long as he paid the rent and as long as we didn't want it for anything else. There was no further conversation."

It appeared further from the evidence that the building was an abandoned warehouse and only the first floor, rented to plaintiffs, was occupied. Defendants employed a watchman, who reported the break in the sprinkler system and the leakage of water on the second floor on December 21, 1949. The engineer called by defendants to repair the break testified that he found a pipe on the second floor of the system had broken; that there was no water coming out of the pipe as it had been shut off, but he found water on the second floor, in the basement and on the first floor of the premises. No report of this leakage was made to plaintiffs and they did not discover the damage to their egg crates until February of 1950 when they discovered that the crates were mildewed, moldy, musty and "literally falling apart" and could not be used for any purpose. More than 10,000 crates were stored in the premises. The undisputed testimony is that they were worth 50 cents a crate.

Defendants argue that the conditions of the leasing are to be determined from the facts in evidence as to the nature and condition of the building at the time of the leasing, and lay stress upon the statement of their renting agent that "we had no accommodation, no lights, no heat, no water, no

toilet facilities, no elevators in the building and could give him (Rothenberg) no accommodations at all with the exception of room where he could store his egg cases."

Defendants further argue that the fact that plaintiffs took out insurance to protect them against damage caused by water from the leakage or breaking of the sprinkling system is evidence that plaintiffs understood that defendants were not to be liable for any damage resulting from carelessness and negligence in the operation and maintenance of the other parts of the building. The conversation of the renting agent with plaintiff contains nothing indicating an intention on the part of defendants to absolve themselves from liability for their failure to properly maintain the upper floors of the building. The language used indicates only the position of defendants that they would furnish nothing but space on the first floor for the storage of the egg crates. This storage did not require light, heat, water, toilet facilities or elevators. The procuring of insurance against damage caused by water from the sprinkler system was merely added protection against a danger, possible if not probable, from the presence of a sprinkler system throughout the building and cannot be construed as evidence of an agreement to exempt defendants from liability for their negligence. We must therefore conclude that the trial court erred in finding that there was an exculpatory agreement absolving defendants from the consequences of the negligence upon which plaintiffs rely.

Defendants further contend that the doctrine of res ipsa loquitur is not applicable to the situation presented by the evidence in this case. They rely principally upon the case of Welch v. New Harper Hotel Co., 196 Ill. App. 94, in which plaintiff sued for damages resulting from a fire originating in the attic of the building where electrical appliances and equipment had been installed for the purpose of running a passenger elevator. The Appellate court reversed the judgment for plaintiff, saying:

"The electrical appliance and equipment in use in the hotel consisted of a motor and connecting wires. There was no management required in its use. It was stationary, and acted automatically without manipulation. * * * Where the apparatus is one that does not require direction or management in its operation and use, as in this case, it is evident that the rule of res ipsa loquitur can have no application."

The court cited no authority for this conclusion, and defendants furnish none. We cannot accept it as the law governing the rule of res ipsa loquitur. See Edmonds v. Heil, 333 Ill. App. 497; O'Rourke v. Field & Co., 307 Ill. 197; McCleod v. Nel-Co. Corp., 350 Ill. App. 216. Here the apparatus causing the damage was exclusively in control of defendants. No evidence was offered excusing defendants from liability for the break of the pipe in the sprinkler system.

The trial court made no specific finding on the question of the application of the doctrine of res ipsa loquitur, except to say, in the argument on the motion to vacate the judgment: "I said if I had to decide that question I think possibly I would have held that the doctrine of res

ipsa loquitur was the proper doctrine to apply, but inasmuch as I was deciding the case on the other theory, I am not expressing any opinion on that question * * * I decided it on the question that there was an agreement between the parties * * * an exculpatory agreement, not written. That the company would not be liable for any negligence in the operation of the building in which the plaintiffs were storing the egg crates."

No question arises as to the amount of damages. In the course of the testimony of the plaintiff Herbert Rothenberg, the court inquired of defendants' counsel, "You are not making an issue of the number of cases involved, nor the amount of the loss, are you?" Counsel replied, "No." The court then said, "Well, then this is not important and counsel does not have to go into that, as I assume the amount of loss sustained is agreed upon."

The judgment is reversed and the cause remanded with directions to the court to enter judgment for plaintiffs.

REVERSED AND REMANDED
WITH DIRECTIONS.

FRIEND, P.J., AND BURKE, J., CONCUR.

445

91A^{2d} 366

46803

COUNTY OF COOK, a Body Politic
and Corporate,

Appellee,

v.

JAMES CARBONE,

Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

JUDGE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an order finding him guilty of contempt in the violation of a temporary injunction issued February 3, 1954, committing him to the County Jail of Cook County for a period of 15 days and directing the payment of \$500.

Plaintiff brought suit to enjoin defendant from conducting any dumping or disposal operations upon premises of defendant located on Irving Park boulevard just west of Wolf road in Cook county, Illinois. A temporary injunction was issued on February 1, 1954. On final hearing of the case a permanent injunction was entered on August 12, 1954. Petition for rule upon defendant to show cause was filed in December 1954, alleging violation of the temporary injunction on December 1st and 2nd, 1954.

The judgment order must be reversed. On final hearing the temporary injunction was merged in the permanent injunction and became functus officio. Nestor Johnson Mfg. Co. v. Goldblatt, 371 Ill. 570; Schuler v. Wolf, 372 Ill. 386.

The order is reversed.

Order reversed.

Friend, P. J., and Burke, J., concur.

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46696

LEO J. KILEY,

Appellant,

v.

SAMUEL ROSE and THOMAS ROSE,
d/b/a ROSE CARTAGE SERVICE,

Appellees.

91A.306

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

JUDGE BURKE DELIVERED THE OPINION OF THE COURT.

An action by Leo J. Kiley to recover for personal injuries suffered because of the alleged negligence of Samuel Rose and Thomas P. Rose resulted in a verdict and judgment for the defendants. Plaintiff's motion for a new trial was denied. He appeals.

At the time of the occurrence plaintiff was 61 years of age and weighed 196 pounds. He was employed by the County and assigned to the Engineering Department as an inspector. His duties were to help with surveys, sign tickets for material delivered at places where highways were being repaired and to advise truck drivers where to dump crushed rock used in repairing the highways. On May 13, 1953, he was assigned to work on Ridgeland Avenue. This highway runs in a northerly and southerly direction. The place on Ridgeland Avenue where plaintiff was working was south of Volmer Road and north of U. S. Highway 30. The latter two highways run in an easterly and westerly direction and intersect Ridgeland Avenue.

The defendants, who are engaged in the trucking business, were hauling crushed stone from a quarry to

-2-

the place on Ridgeland Avenue where plaintiff was working. One of the defendants, Thomas P. Rose, was driving a six wheel dump truck hauling stone. Gene Tomky was driving another truck for the defendants. There were chuck holes in the surface of the roadway. Plaintiff was supervising the spreading of crushed stone to fill these holes. The surface of the roadway at the scene of the occurrence was about 18 feet wide. The truck being driven by Thomas P. Rose is described as the "old truck." It was five years old at the time of the occurrence. The truck being driven by Tomky is described as the "new truck" and was three years old at that time. The trucks were about the same type and size.

Thomas P. Rose drove his truck south on Ridgeland Avenue from Volmer Road. He dumped his load in accordance with the directions of plaintiff. Shortly thereafter Tomky drove his truck south on Ridgeland Avenue. He turned his truck in a driveway and drove in a northerly direction. Thomas Rose waited for Tomky to make the turn. Plaintiff got on the left running board of the truck Tomky was driving and at plaintiff's direction Tomky drove 300 or 400 feet in a northerly direction. Thomas Rose then turned his truck around and also proceeded in a northerly direction. Tomky stopped his truck on the highway before unloading. Thomas Rose started to drive his truck past the truck Tomky was driving. The left wheels of the Thomas Rose truck were off the shoulder of the road on the grass. The right wheels of this truck were perhaps a foot or two

on the shoulder. There was a space of approximately three feet between the dump bodies of the two trucks. As Thomas Rose was passing the other truck he saw the plaintiff on the running board. At a point where Rose could't see the plaintiff "any more" Rose heard a scream and stopped the truck. He said that in passing he was driving approximately five miles an hour in low gear. Ridgeland Avenue at that point was open to traffic. On stopping his truck, Thomas Rose ran around the front of the truck to help the plaintiff, who was lying at an angle between the two vehicles. Two men from an automobile parked 200 feet to the north, came over, got the plaintiff up and assisted him to their car. One of the men took the plaintiff to a hospital. There was no damage to either truck.

It was customary for inspectors to ride on the running board of the trucks. The window on the left side of Tomky's truck was open and plaintiff as he was standing on the left hand side of the truck was holding on with his right hand and facing north. Plaintiff testified that when Tomky's truck reached the place where the stone was to be dumped, he brought his truck to a stop. Then plaintiff began instructing Tomky as to where the stone was to be dumped. While the old truck driven by Thomas Rose was passing Tomky's truck, plaintiff was still on the running board of the latter truck. Rose did not remember if he sounded his horn as he started to pass. He "did not know" if his truck came in contact with the plaintiff. Plaintiff said that the old truck was moving at a speed of 10 to 15 miles per hour and that as the truck driven by Rose was passing Tomky's truck, some part of this "old" truck struck

plaintiff and he was thrown forward between the two trucks and pinned between the front wheels on the left side of Tomky's truck and the right rear dual wheel of the old truck. Tomky testified that when he stopped the new truck plaintiff stepped back off the running board and at that time was hit by the old truck. There was evidence that plaintiff's left shoulder and arm were injured. He was first taken to the Oak Forest Infirmary and the next day to the Hinsdale Sanitarium. There was evidence that he suffered a comminuted fracture of the humerus which involved the cervical neck. Evidence was introduced by both bearing on the extent of the injuries.

Plaintiff maintains that the court committed reversible error in instructing the jury at the request of the defendants. The defendants say that the court did not commit error in instructing the jury and that "if there is any error, harmless or otherwise in the instructions, plaintiff's counsel has, in effect, waived any objection he might have had." Defendants assert that on the last day of the trial counsel for both parties met in the chambers of the trial judge and plaintiff's attorney suggested that while the argument was in progress that the trial judge select from the instructions handed to him those which he desired to give to the jury, that during the argument the trial judge selected 10 instructions tendered by plaintiff and 20 tendered by defendants, which were read to the jury, that neither attorney examined the instructions submitted by the other, and that the court's action was

induced by the suggestion of plaintiff's counsel. Defendants support their contention by an affidavit of their counsel. The material averments of the affidavit were denied in a counter affidavit by plaintiff's counsel. We cannot consider these affidavits. The trial judge does not certify that plaintiff's counsel made the suggestion set out in the affidavit filed by the defendants. There is nothing in the record to preclude plaintiff from arguing that the instructions are erroneous.

Plaintiff insists that the court committed reversible error in giving at defendants' request an instruction which told the jury that even if the defendants were guilty of negligence that if the plaintiff failed to exercise ordinary care "then he cannot recover." This was a preemptory instruction and cannot be cured by other instructions. The court committed reversible error in giving this instruction because it failed to include one of the elements which would bar plaintiff from maintaining his cause of action, namely, that his failure to exercise ordinary care must have proximately caused or contributed to cause his injury. See Schmidt v. Anderson, 301 Ill. App. 28; Buehler v. White, 337 Ill. App. 18. This instruction also failed to limit the time in which the plaintiff was required to exercise ordinary care "at or immediately prior to the occurrence."

Plaintiff asserts that the trial court erred in instructing the jury that "the fact that an accident occurred of itself raises no presumption of negligence

or wilful or wantonness or liability on the part of the defendants for such injury, if any." There is no evidence that this occurrence was an "accident" within the lawful meaning of the word. In Rzeszewski v. Barth, 324 Ill. App. 356, we said that the giving of this instruction should be discouraged. The jurors are instructed on the issues of the case and this form of instruction tends to divert their attention from the issues. The instruction also is misleading in referring to "willful or wantonness" in that there was no such allegation in the complaint.

We are also of the opinion that defendants' given instruction No. 2 is erroneous in that it assumes the existence of a condition which was sharply in dispute. This instruction also errs in that it tells the jury that the plaintiff cannot recover if he was guilty of negligence regardless of whether such negligence was the proximate cause of the injuries he sustained. We cannot say that the giving of defendants' instruction No. 5 is reversible error. On a retrial, however, the instruction should not be confined to the actions of the defendant, Thomas P. Rose. Defendants' instruction No. 29, telling the jury that the plaintiff had no right to "knowingly expose himself to danger" and to recover damages for an injury which he might have avoided by reasonable precaution, erroneously assumed that the plaintiff was in danger. We think that defendants' instruction No. 14 put an undue emphasis on what the plaintiff was required to prove. We cannot sustain the contention that counsel for the defendants

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indulged in conduct highly prejudicial to the plaintiff.

Because of the erroneous instructions there should be a new trial. Therefore the judgment of the Circuit Court of Cook County is reversed and the cause is remanded with directions to proceed in a manner consistent with these views.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

FRIEND, P. J., and NIEMEYER, J., CONCUR.

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46730

JULIUS RYNIECKI,

Appellee,

v.

CHESTER SIPIORA and SHIRLEY
SIPIORA,

Appellants.

9 I.A. 2d 557

APPEAL FROM

COUNTY COURT

COOK COUNTY

JUDGE BURKE DELIVERED THE OPINION OF THE COURT.

A judgment by confession was entered in favor of Julius Ryniecki and against Chester Sipiora and Shirley Sipiora for \$1350.75. The defendants filed a petition to vacate and open up the judgment in which they stated that they did not know they were signing a judgment note, that the plaintiff owed them \$600 for securing for him two new customers for which no credit was given on the note, and that the obligation was incurred as the result of extra work on a house being erected by plaintiff for the defendants done in an unworkmanlike manner. Plaintiff's motion to strike the petition was allowed. Pursuant to leave granted the defendants filed another motion to vacate and open up the judgment.

In the affidavits in support of the second motion the defendants said that they had no knowledge of the judgment note and that if their signatures appeared thereon they were obtained through fraud and misrepresentation in that they were not told that they were signing a judgment

1. The first part of the paper is devoted to a general discussion of the problem of the existence of solutions of the system of equations

$$\begin{cases} \Delta u = f(x, y, z, u, v, w) \\ \Delta v = g(x, y, z, u, v, w) \\ \Delta w = h(x, y, z, u, v, w) \end{cases}$$

where f, g, h are continuous functions of the variables x, y, z, u, v, w and satisfy certain conditions. The second part of the paper is devoted to the study of the properties of the solutions of the system of equations

$$\begin{cases} \Delta u = f(x, y, z, u, v, w) \\ \Delta v = g(x, y, z, u, v, w) \\ \Delta w = h(x, y, z, u, v, w) \end{cases}$$

when the functions f, g, h are linear in the variables u, v, w . The third part of the paper is devoted to the study of the properties of the solutions of the system of equations

$$\begin{cases} \Delta u = f(x, y, z, u, v, w) \\ \Delta v = g(x, y, z, u, v, w) \\ \Delta w = h(x, y, z, u, v, w) \end{cases}$$

when the functions f, g, h are quadratic in the variables u, v, w . The fourth part of the paper is devoted to the study of the properties of the solutions of the system of equations

$$\begin{cases} \Delta u = f(x, y, z, u, v, w) \\ \Delta v = g(x, y, z, u, v, w) \\ \Delta w = h(x, y, z, u, v, w) \end{cases}$$

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note at the time they were induced to sign various documents in connection with the purchase of their "home." Plaintiff's motion to strike the second petition was sustained and defendants' petition was dismissed "with prejudice." They appeal.

The defendants are not in a position to urge error in the ruling of the court sustaining the first motion to strike their petition. It is an elementary rule of practice that a litigant waives all objections to the decision of the court in sustaining a motion to strike his pleading when he elects to abandon the pleading and file an amended pleading in its stead. See Trembois v. Standard Railway Equipment Mfg. Co., 337 Ill. App. 35. Therefore the counterclaim alleged in the first motion and not mentioned in the second motion cannot be considered.

The only defense presented in the second motion is that the defendants had no knowledge of the judgment note signed by them "being in existence" and that if their signatures appear on the note that the signatures were obtained by fraud and misrepresentation in that they were not told they were "signing any judgment note at the time" they were "induced to sign various documents in connection with the purchase" of their home, Rule 26 of the Supreme Court requires that a motion to open a judgment by confession shall be supported by affidavit in the manner provided by Rule 15, which requires that the affidavit shall be made on the personal knowledge of the affiant, set forth with

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particularity the facts upon which the evidence is based, not consist of conclusions but such facts as would be admissible in evidence, and affirmatively show that the affiant, if sworn as a witness, can testify competently thereto. The petition fails to measure up to the requirements of these rules. "Fraud is never presumed. It must be pleaded and proved. Fraud must be shown by the allegation of facts from which it is the necessary or probable inference. Fraud cannot be made out by the profuse interpolation of adjectives characterizing acts alleged to be done as fraudulently done." Sulinski v. Humboldt and Wabansia Building Corp. et al. 315 Ill. App. 392, 402.

Therefore the judgment of the County Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

FRIEND, P. J., and NIEMEYER, J., CONCUR.

The first of these is the fact that the
 government has been unable to raise the
 necessary funds to meet its obligations.
 This is due to a number of factors, including
 the fact that the government has been unable to
 collect the necessary taxes, and the fact that
 the government has been unable to borrow the
 necessary funds from the international market.
 The second factor is the fact that the
 government has been unable to control the
 inflation rate, which has led to a sharp
 decline in the value of the national currency.
 This has led to a sharp increase in the
 cost of imports, and a sharp decline in the
 value of exports, which has led to a sharp
 decline in the government's revenue.
 The third factor is the fact that the
 government has been unable to control the
 money supply, which has led to a sharp
 increase in the money supply, and a sharp
 decline in the value of the national currency.
 This has led to a sharp increase in the
 cost of imports, and a sharp decline in the
 value of exports, which has led to a sharp
 decline in the government's revenue.

The fourth factor is the fact that the
 government has been unable to control the
 balance of payments, which has led to a
 sharp increase in the balance of payments
 deficit, and a sharp decline in the value of
 the national currency. This has led to a
 sharp increase in the cost of imports, and a
 sharp decline in the value of exports, which
 has led to a sharp decline in the government's
 revenue.

46727

WALTER N. GLASS,

Appellant,

v.

GEORGETTE GLASS and CENTRAL
NATIONAL BANK OF CHICAGO,

Appellees.

9 I.A.^{2d} 568
APPEAL FROM CIRCUIT

COURT, COOK COUNTY.

MR. PRESIDING JUSTICE McCORMICK DELIVERED THE OPINION
OF THE COURT.

The plaintiff, Walter N. Glass, filed an "Original
Bill in the Nature of a Bill of Review," which was dismissed
on motion of defendant Georgette Glass. From the order of
dismissal this appeal is taken.

It appears from the record that the decree sought to
be reviewed was entered in a divorce action filed by
Georgette Glass against Walter Glass on August 29, 1952.
The defendant therein was served with summons. In the
complaint the plaintiff alleged desertion on the part of
the defendant. The complaint also set out that "the
plaintiff and the defendant are the owners of the house and
lot located at 9437 Rhodes avenue, Chicago, Illinois; that
the plaintiff has paid down on said house and lot with her
own and separate money, and the plaintiff has worked to
keep up the payments on said house and lot." The prayer
for relief was that the plaintiff be granted a divorce,
custody of the minor children, alimony, child support and
attorney's fees, and contained a prayer for general relief.

An appearance in the divorce action was entered
on behalf of the defendant on October 9, 1952; however

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 policy of non-interference in the
 internal affairs of the country.
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 The tenth is the fact that the
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 policy of non-interference in the
 internal affairs of the country.

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no answer was filed. On October 10, 1952, a default was entered against the defendant and a hearing was held in the case November 19, 1952. On December 2, 1952 the plaintiff filed an amended complaint in the divorce action without either notice to the defendant or an order of the court. The amended complaint was the same as the original complaint except for an additional prayer for relief to the effect that the plaintiff be declared and established as the sole fee simple owner of the real estate described as 9437 Rhodes avenue free from any right, title or interest of the defendant, and that the court order "said defendant to convey by quitclaim deed all of his right, title and interest to the hereinabove described real estate within three days from the date of said decree and upon his failure to do so that a master in chancery be appointed to make said conveyance for and on behalf of said defendant." On the same day that the amended complaint was filed a decree was entered dissolving the marriage between the parties, awarding the custody of the minor children to the plaintiff, ordering the defendant to convey within three days all of his right, title and interest to the said real property, and in case of his default in making such conveyance, a designated master in chancery was empowered and directed to execute the deed of conveyance. On December 22, 1952 a quitclaim deed was executed by the designated master in chancery conveying the real estate in question to Georgette Glass. On March 5, 1953 a claim for a mechanic's lien

The first thing I noticed when I stepped out of the car was the cold, crisp air. It felt like a fresh blanket after a long, hot summer. I took a deep breath, savoring the scent of pine and the distant sound of water. The morning sun was just beginning to rise, painting the sky in soft, pastel hues. I walked towards the lake, my feet crunching on the path of fallen leaves. The water was still, reflecting the early light like a perfect mirror. I saw a small boat in the distance, its oars dipping gently into the calm surface. The world felt so peaceful, so quiet. I had found a little slice of heaven on earth. I walked until I reached the shore, where the water lapped at my ankles. I sat down on a log, watching the ripples spread across the lake. The sun was higher now, and the light was warmer. I felt a sense of calm wash over me, all my worries and stresses melting away. I stayed there for hours, just sitting and watching the world go by. It was a perfect moment, one I would never forget. The day was beautiful, and I was so lucky to be there. I had found what I needed, and it was right in front of me. I smiled to myself, feeling grateful for everything. The lake was truly a magical place, and I was so happy to have discovered it. I would come back here often, to enjoy the peace and beauty of this special spot. It was a gift, and I would treasure it forever.

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against the said property was filed with the clerk of the Circuit Court of Cook County based on a mechanic's lien in favor of the Central National Bank of Chicago as the assignee of Courtesy Lumber Company, which lien is said to have arisen by virtue of a contract made on January 27, 1953 between Georgette Glass and the Courtesy Lumber Company, which contract it is alleged was not performed and the lien should be cancelled.

On January 9, 1953 a motion to vacate the decree in the divorce action and, among other things, to restrain the plaintiff Georgette Glass from disposing of the real estate was entered and continued from time to time, but was not called up for hearing and no order was entered thereon.

On October 20, 1953 Walter Glass (hereafter referred to as plaintiff) filed in the Circuit Court of Cook County a complaint in chancery entitled "Original Bill, in the nature of a Bill of Review to Review and Reverse Decree for Divorce." In the bill all the proceedings in the cause were set forth with the exception of the filing of the motion to vacate subsequent to the entry of the divorce decree. The complaint also set up in detail allegations of fraudulent conduct on the part of Georgette Glass (hereafter referred to as defendant), which it is alleged caused the plaintiff to believe that she would not proceed with her divorce suit, and that because of which conduct he took no action to defend and that he had no knowledge that a decree was

entered in the cause until January 3, 1953. It is further alleged that the real property is in a state of waste and disrepair, and that the rents therefrom are being collected by the defendant. The plaintiff prays that the decree heretofore entered in the divorce case be reviewed and set aside, that the master's deed executed by the master in chancery conveying the real estate be delivered up and cancelled and the plaintiff be declared to be the sole owner of the real estate, that the defendant be required to give an account with reference to rents collected, and that the court appoint a receiver to collect and disburse the rents from the property. The Central National Bank of Chicago was made an additional party defendant.

On December 18th the defendant Georgette Glass filed a motion to strike the complaint, setting up as grounds that the court lacks jurisdiction over the subject matter; that the complaint was filed without leave of court; and that it appears from the complaint "that there are matters alleged therein requiring extrinsic evidence and that such bills of review can only be filed by leave of court." On May 21, 1954 defendant's motion to strike the complaint was sustained.

On May 21, 1954 the defendant entered a motion, on notice, for leave to amend the order of May 21, 1954, to dismiss the complaint. On June 1, 1954 the plaintiff asked leave to file an amended complaint, which was in substance the same as the complaint theretofore filed,

[illegible]

but set up in addition the fact that a motion to vacate the divorce decree and to restrain the plaintiff therein from disposing of the real estate was filed and continued from time to time, and that no order was entered thereon; that the motion has been "left off the call," abandoned, waived and withdrawn; that the motion was coram non judice, and since it had been originally filed more than thirty days after the entry of the decree of divorce, was without effect. The court refused to permit the filing of the amended bill and permitted the original order to be amended so that the bill for review was dismissed. It is from this order that the appeal before us is taken.

The plaintiff's theory is that the trial court was in error in ordering the complaint to be stricken as well as in subsequently ordering its dismissal; that the trial court should have permitted the plaintiff to file instanter his amended complaint, and was in error in concluding that the original suit was pending at the time that the instant proceeding was commenced.

Defendant contends that the court acted properly since the proceeding before it was an original bill in the nature of a bill of review which added a new party and sought relief against the party by alleging new matter and therefore it was necessary for the plaintiff to have leave of court before the complaint could be filed, and also contends that the allegations in the bill with respect to fraud are not sufficient to entitle the

plaintiff to relief.

Section 72 of the Civil Practice Act in force January 1, 1956 has abolished all the provisions formerly controlling with reference to bills of review or bills in the nature of bills of review in chancery actions. However, even though the contentions before us could not be raised if the order had been entered after January 1, 1956, nevertheless rulings with reference to procedural matters must be determined under the law governing at the time the judgment or order was entered. The proceedings before us have not become moot, even though the learning concerning the procedural rules governing such bills has been by the fiat of the legislature relegated to the limbo ^{of} defunct legal lore. It therefore becomes necessary for us to consider the rules governing the procedure herein involved as they were before the first of January, 1956.

For practical purposes bills of review or bills in the nature of bills of review may be divided into three classes, namely, bills for error appearing on the face of the record, bills for newly discovered evidence, and bills for fraud impeaching the original transaction. Moore v. Shook, 276 Ill. 47. For the purpose of this opinion it is not necessary to discuss the distinction which exists between bills of review and bills in the nature of bills of review. A bill of review brought because of newly discovered evidence cannot be filed

without leave of court. Story's Equity Pleadings, 9th Ed., sec. 412. Bills impeaching the decree for fraud may be filed without leave of court, as may bills for error appearing on the face of the record. Adamski v. Wieczorek, 170 Ill. 373; Nestor Johnson Mfg. Co. v. Alfred Johnson Skate Co., 266 Ill. App. 130; Daniell's Chancery Pleading and Practice, 6th Amer. Ed., pp. 1577-78; Schaefer v. Wunderle, 154 Ill. 577. Where a bill of review for error apparent on the face of the record or to impeach a decree for fraud is joined with averments of newly discovered evidence, it will be necessary to obtain leave of court before filing. Nestor Johnson Mfg. Co. v. Alfred Johnson Skate Co., supra. It is also proper, where the original decree has been carried into execution, to pray that the party complaining of the former decree be put into the situation in which he would have been if that decree had not been executed; and if any party who is not a party to the original suit has become interested in the subject matter, he must be made a party to the bill of review. Daniell's Chancery Pleading and Practice, 6th Amer. Ed., p. 1581; Story's Equity Pleadings, 9th Ed., Sec. 426; Chicago Building Society v. Haas, 111 Ill. 176; Adamski v. Wieczorek, supra, at p. 376.

The defendant has misapprehended the meaning of the term "newly discovered evidence" or "new matter discovered since the decree," as used where the bill for review seeks to impeach the original decree on that

ground. The new matter referred to must be relevant and material and must be such, for example, as the discovery of a release or a receipt which would change the merits of the claim upon which the decree was founded (Story's Equity Pleadings, 9th Ed., Sec. 412); it must be matter which if known could have been used in the original trial, and it is distinguished from a bill brought to impeach a decree on the ground of fraud (Story's Equity Pleadings, 9th Ed., Sec. 414). It has always been understood that in order to prove the issues where a bill impeaching a decree for fraud is brought, additional evidence might be introduced, and it is equally true that additional evidence is necessary to support the allegations of a bill for review seeking incidental relief and restoring the aggrieved party to his former position. Whatever evidence might be necessary or proper in support of the bill before us would be evidence which would be necessary either to support a charge of fraud or to support the ancillary relief prayed for in the bill for the purpose of restoring the plaintiff to the position previously occupied by him. It would not be evidence of the character which would make the bill of review one to impeach the decree for new matter.

The question is then before us as to whether this bill could be sustained either upon error apparent on the record or because of fraud.

The error on the record complained of is that

after the default had been taken against the plaintiff and after the hearing an amendment substantially changing the prayer for relief was permitted by the court to be filed without notice to the plaintiff and without an order upon him to plead. This was in direct violation of the statute. Section 34 of the Practice Act (Ill. Rev. Stat. 1953, chap. 110, par. 158) provides that except in cases of default the prayer for relief shall not be deemed to limit the relief obtainable, but where other relief is sought the court shall by proper orders and upon such terms as may be just protect the adverse party against prejudice by reason of surprise. Western Smelting Co. v. Benj. Harris & Co., 302 Ill. App. 535. Before this provision in the Practice Act was enacted it had been held that where an amended pleading has been filed after default the default was thereby set aside. Lyndon v. Lyndon, 69 Ill. 43; Feldott v. Featherstone, 290 Ill. 485; Gilbert v. The American Trust & Savings Bank, 118 Ill. App. 678; Peck v. Peck, 214 Ill. App. 41. Since this ground alleged in the bill of review was sufficient, it is not necessary for us to consider whether the allegations of fraud made therein could sustain the bill. However, it is our opinion that the allegations were sufficient and that the bill might also be sustained on that ground. There was no allegation in the bill which would bring it under the classification of a bill to impeach a decree upon the discovery of new matter, and

-10-

consequently there was no necessity to obtain leave of court in order to file the bill.

Apparently defendant makes no point on the fact that there was a motion to vacate the decree undisposed of in the files. Since the motion was filed after thirty days had expired, it had no validity and could have been stricken by the court on its own motion.

The court erred in entering its orders to strike and dismiss the bill. The orders are reversed and the cause remanded with directions to proceed in conformity with the views herein expressed.

Reversed and Remanded.

Robson and Schwartz, JJ., concur.

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46755

THE MUTUAL NATIONAL BANK OF CHICAGO,
as Trustee under its Trust No. 308,
Appellee,

v.

HARVEY WINKELMAN et al.,
Defendants below,
Appellees.

On Appeal of CARL J. CARLSON,
Defendant below,
Appellant.

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APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE McCORMICK DELIVERED THE OPINION
OF THE COURT.

The Superior Court of Cook County, after a hearing on a stipulation of facts in an action in the nature of an interpleader involving a fund of \$6,500, entered a decree directing the plaintiff to retain out of the said fund fees in the aggregate amount of \$590 and as expense money \$408.71, and to pay to the legatees of Julius Bollinger and heirs of deceased legatees an aggregate sum of \$3,242.71, the balance to be then paid to Carl J. Carlson. From this decree Carlson appeals.

In November of 1930 the defendant Carl J. Carlson and his wife (now deceased) traded their equity in an apartment building in Chicago for a bungalow and two vacant lots owned by Julius Bollinger and his wife, which were also located in Chicago. The general property taxes for 1928, 1929 and 1930 were unpaid on the apartment building property, for 1929 and 1930 on the bungalow, and for 1928, 1929 and 1930 on the vacant lots. The unpaid and accrued taxes on the apartment building property were estimated to amount to \$3,689.20, and

the unpaid taxes on the Bollinger property were estimated to amount to \$677.91. At the time of the trade neither the correct nor final assessed valuations for the 1929 and 1930 taxes, nor the correct tax rates, were ascertainable, and Carlsons' objections to judgment for sale for 1928 taxes on the apartment building and the Bollingers' objections on the vacant lots were pending in the County Court.

November 14, 1930 the Carlsons and Bollingers entered into a written agreement under which they severally agreed to pay 1928 taxes on the parcels each was conveying to the other within ten days after judgment was entered by the County Court on the pending objections, and likewise to pay the 1929 taxes within ten days after judgment on the 1929 tax objections. Both parties agreed to adjust the 1930 taxes for the period from January 1, 1930 to November 14, 1930 on the basis of the amounts finally paid the County treasurer for 1929 taxes, within ten days after the 1929 taxes were paid. This agreement further provided that since there would be a net difference in favor of the Bollingers after tax objections were disposed of, the Carlsons should convey the two Western avenue lots to the plaintiff Mutual National Bank of Chicago, as trustee, to hold title until all the obligations on the 1928, 1929 and 1930 taxes were paid. It was further agreed that in the event the Carlsons defaulted in the payment of these taxes the bank, as such trustee, should sell the lots held in the trust and use as much of the proceeds as might be necessary to "retire the obligations" of the Carlsons.

The United States on the following property was claimed to

amount to \$687,01 At the time of the title transfer the

contract and final assigned warranties for the 1929 and 1930

years, nor the contract or notes, were surrendered, and

Citizens' object was to judgment for sale for 1929 years on

the apartment building and the following objections on the

warrant lots were made to the Court below.

November 1, 1940, the directors and officers entered into a written agreement under which any director or officer pay 1939 taxes in the calendar year next following to the extent of his non-duty after judgment was rendered by the Tax Court on the pending objections, and likewise to pay the 1939 taxes within ten days after judgment on the 1939 tax objections. Both parties agreed to effect the 1939 taxes for the period from January 1, 1939 to November 1, 1939 on the basis of the amounts finally paid by Henry Rosenberg for 1939 taxes, within ten days after the 1939 taxes were paid. This agreement was embodied in the following resolution which was adopted by the Board of Directors of the Baltimore and Annapolis Electric Company, Inc. on November 1, 1940:

Resolved, That the Board of Directors of the Baltimore and Annapolis Electric Company, Inc. do hereby agree to pay the 1939 taxes of the Baltimore and Annapolis Electric Company, Inc. for the period from January 1, 1939 to November 1, 1939 on the basis of the amounts finally paid by Henry Rosenberg for 1939 taxes, within ten days after the 1939 taxes were paid.

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The two Western Avenue lots were thereupon conveyed to the plaintiff as trustee. The trust agreement named the Carlsons as joint beneficiaries, and provided that in the event they should be in default under the terms of the agreement between the Bollingers and the Carlsons aforementioned, the trustee was authorized and directed to sell the trust property to the highest bidder and "after paying the taxes provided for in the agreement," remit the surplus to "Carl J. Carlson and Frieda Carlson, his wife, or the survivor thereof."

The apartment building traded by the Carlsons to the Bollingers was at the time encumbered with a mortgage which included a pledge of the rents. On August 13, 1932 the Bollingers by warranty deed conveyed this building to one Jane McDowell subject to all encumbrances and taxes and special assessments of record. In September of 1932 a suit was filed to foreclose the mortgage on the building, and a receiver was appointed in October, 1932. A decree of foreclosure and sale was subsequently entered in the foreclosure proceedings, and on September 9, 1935 the building was sold to one Walter L. Cohrs, pursuant to the decree, and on December 12, 1936 the property was conveyed by master's deed to "80th and Laflin Apartments, Inc." On January 2, 1934 Jane McDowell by quit claim deed reconveyed the apartment building to the Bollingers.

Julius Bollinger died testate December 29, 1941 (his wife having predeceased him), and his estate was probated in the Probate Court of Cook County and closed.

The objections filed by the Carlsons with respect to both 1928 and 1929 taxes on the apartment building were sustained by the County Court on July 13, 1934, and the amount of the 1928 taxes on the property was then finally determined at \$1,177.46 and the 1929 taxes were determined at \$1,395.56. The receiver in the mortgage foreclosure proceedings paid all the 1928 taxes; the last payment was made on August 27, 1934. The receiver also made payments on the 1929 taxes, the final payment on which was made by 80th and Laflin Apartments, Inc. on April 14, 1938. On the 1930 taxes the receiver, as well as Walter Cohrs, made certain payments, and the 80th and Laflin Apartments, Inc. paid the balance on April 14, 1938.

The 1929 and 1930 taxes on the bungalow traded to the Carlsons were paid by Carlson's grantee, and the 1928, 1929 and 1930 taxes on the two Western avenue lots were discharged through tax foreclosure sale.

On June 17, 1954 the lots were sold at public auction for \$6,500 by the trustee, and on September 9, 1954 the trustee as plaintiff filed this suit claiming its expenses and attorney's fees and requesting instructions as to the respective rights of the defendant Carlson and the legatees and heirs of the deceased legatees of Bollinger in the balance remaining after allowance of such expenses and fees.

Carlson filed an answer claiming the entire proceeds of the sale, less expenses and attorney's fees due to the

trustee. He set up that any claim which the Bollingers or anyone claiming through them might have by reason of the agreement of November 14, 1930 was barred by the ten-year statute of limitations (Ill. Rev. Stat. 1953, chap. 83, par. 17), and that any mortgage lien created by the deed in trust and trust agreement was barred by the twenty-year statute of limitations under provisions of paragraph 11-b of chapter 83. He also set up other defenses.

Answers were filed by the defendants who were various legatees and heirs of deceased legatees of Bollinger, and in the answers they claimed that when the 1928, 1929 and 1930 taxes had been determined there was due to the Bollingers from the Carlsons \$3,571.18.

Defendant Carlson here contends that any claim derived through the Bollingers was barred by the statute of limitations, and that the defendants claiming under the Bollingers are not the proper persons to maintain the claim they assert.

The defendants who claim under the Bollingers filed no brief in this court. It has been repeatedly said that under such circumstances we would be warranted in reversing and remanding the cause without a consideration of the merits. Barton v. Barton, 318 Ill. App. 68; Eichelberger v. Robinson, 233 Ill. App. 579. However, we will consider the case on the merits.

To all intents and purposes this was a bill of interpleader, filed by the Mutual National Bank of Chicago

circles. He set up this kind of relationship or anyone claiming through them should have the reason of the agreement of November 14, 1970 was based by the ten-year statute of limitations (III. Rev. Stat. 1970, Chap. 60, par. 12), and even any mortgage lien created by the deed in trust and first agreement was based by the twenty-year statute of limitations under provision of paragraph 11-b of chapter 81. He also set up other law cases.

Answers were filed by the defendant who were various legacies and heirs of deceased James C. Williams, and in the answers they claimed it is from the 1928 and 1930 taxes had been delinquent there was no tax on the delinquency from the Statute of 1928.

Defendant's position was that any of the money through the Williams was based by the statute of limitations, and that the defendant of that under the Williams was not the proper person to inherit the estate of a person.

The court said that the Williams was based by the statute of limitations, and that the defendant of that under the Williams was not the proper person to inherit the estate of a person. The court said that the Williams was based by the statute of limitations, and that the defendant of that under the Williams was not the proper person to inherit the estate of a person.

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as trustee. The defendants Carlson and those claiming through Julius Bollinger were before the trial court litigating the question among themselves as if one had brought a complaint and the others had answered. National Union v. Keefe, 172 Ill. App. 101; Foerster v. Enzenbacher, 178 Ill. App. 551. As between Carlson and the claimants under Julius Bollinger, the only action available to the latter against Carlson was an action on the contract of November 14, 1930, or a foreclosure suit if that contract was considered to be an equitable mortgage. In either case the statute of limitations barred the action. In their answers the defendants claiming under Bollinger assert "that when the 1928, 1929 and 1930 general taxes were finally determined there was due the Bollingers from the Carlsons the sum of \$3,571.18." The 1928 and 1929 taxes were finally determined on July 13, 1934. Under the agreement these taxes should have been paid within ten days after such determination, and the 1930 taxes were to be adjusted in cash within ten days after the 1929 taxes were paid in full, which was on April 14, 1938. The ten-year statute of limitations (Ill. Rev. Stat. 1953, chap. 83, par. 17) began to run on July 23, 1934 as to the 1928 and 1929 taxes, and on April 24, 1938 on the purported 1930 tax liability. The instant suit was filed Sept. 9, 1954. It has been held that the statute of limitations begins to run either from the time the holder is entitled to make a demand or within a reasonable time thereafter. Katt v. Chapman, 248 Ill. App. 12. If the contract of November 14, 1930

should be considered--as it might well be--a mortgage, we are met with the legal rule that the foreclosure of a mortgage is barred when the action on the obligation is barred. Bridge v. Dunn, 341 Ill. App. 420; Emory v. Keighan, 88 Ill. 482.

Defendant Carlson also argues that the defendants claiming through Bollinger are not the proper persons to maintain the claims they assert, which contention was raised by Carlson in his answer to the instant suit.

Julius Bollinger died testate December 29, 1941. His estate was probated in the Probate Court of Cook County and closed. His residuary legatees, in equal shares, were Christian Bollinger (now deceased), Clara Borchardt (now deceased), and the defendants Harvey Winkelman, Fred Fischer and Frieda St. Sauveur. Christian Bollinger died intestate after the death of Julius, leaving as his sole heirs the defendants Elsie Bollinger, his widow, Walter Bollinger, Christian Bollinger, Jr., Hattie Pepich and Minnie Zelenka, his children. Clara Borchardt died after the death of Julius Bollinger, leaving as her sole heirs defendants Erwin Borchardt and LaVergne Sturny, her children.

Section 95 of the Probate Act (Ill. Rev. Stat. 1953, chap. 3, par. 247) provides:

"* * * When assets are discovered after distribution of the estate has been made and the executor or administrator has been discharged, on the verified petition of the executor or administrator the court may vacate the order of discharge and permit the executor or administrator to administer the newly discovered assets or on the veri-

1. The first question is whether the defendant is a citizen of the United States. The defendant was born in the United States, and is therefore a citizen.

2. The second question is whether the defendant is a resident of the United States. The defendant has lived in the United States for more than five years, and is therefore a resident.

3. The third question is whether the defendant is a member of the armed forces of the United States. The defendant is not a member of the armed forces.

4. The fourth question is whether the defendant is a member of the reserve forces of the United States. The defendant is not a member of the reserve forces.

5. The fifth question is whether the defendant is a member of the National Guard of the United States. The defendant is not a member of the National Guard.

6. The sixth question is whether the defendant is a member of the National Youth Administration. The defendant is not a member of the National Youth Administration.

7. The seventh question is whether the defendant is a member of the National Labor Relations Board. The defendant is not a member of the National Labor Relations Board.

8. The eighth question is whether the defendant is a member of the National Labor Relations Board. The defendant is not a member of the National Labor Relations Board.

9. The ninth question is whether the defendant is a member of the National Labor Relations Board. The defendant is not a member of the National Labor Relations Board.

10. The tenth question is whether the defendant is a member of the National Labor Relations Board. The defendant is not a member of the National Labor Relations Board.

fied petition of any interested person, letters of administration ~~de bonis non~~ with the will annexed or of administration ~~de bonis non~~ may be issued as the case requires."

It has been held that the heirs of a person dying intestate cannot maintain a suit in their own name upon a written obligation payable to the decedent (Leamon v. McCubbin, 82 Ill. 263), and that the only person who may conduct a suit to collect and distribute an asset of an estate is the personal representative (Oulvey v. Converse, 326 Ill. 226; McGooden v. Bartholic, 132 Ill. App. 392). There is only one exception to this rule, which is that where there are no debts or claims of any kind against the estate and nothing for an administrator, if one should be appointed, to do, but to distribute the personal estate to those entitled to it by law, the heirs may maintain the necessary actions for the purpose of reducing property to possession in order that it may be distributed. To maintain such an action sufficient facts must be set up in the complaint to bring the claimants under the exception to the rule. Weiland v. Weiland, 297 Ill. App. 239. Here, in the answers, which in this type of suit correspond to a complaint, no such showing was made.

Carl J. Carlson is entitled to the sum of \$6,500, less the attorney's fees and expenses in the sum of \$998.76 as set up in the decree heretofore entered on April 27, 1955. The decree of the Superior Court of Cook County is reversed and the cause is remanded with directions to enter a decree in conformity herewith.

Reversed and remanded with Directions.

Robson and Schwartz, JJ., concur.

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7. *Conclusions* – The results of this study suggest that the use of a single, standardized, and validated questionnaire is a feasible and reliable method for assessing the prevalence of mental health problems in a community sample. The results also suggest that the prevalence of mental health problems is higher in the community than in the clinical setting. This finding is consistent with the results of other studies that have found that the prevalence of mental health problems is higher in the community than in the clinical setting. The results also suggest that the prevalence of mental health problems is higher in the community than in the clinical setting. This finding is consistent with the results of other studies that have found that the prevalence of mental health problems is higher in the community than in the clinical setting.

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PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

v.

CALVIN BELCHER,

Plaintiff in Error.

91A. 500
ERROR TO MUNICIPAL COURT
OF CHICAGO.

JUDGE ROBSON DELIVERED THE OPINION OF THE COURT.

The defendant, Calvin Belcher, was tried and convicted for possessing and controlling "cannabis, known as marijuana" in violation of par. 192.2, ch. 38, Ill. Rev. Stat. 1953. He was sentenced to three years in the House of Correction.

Defendant contends that the information filed against him was insufficient and therefore void, because it failed to allege (1) that the possession was unlawful, and (2) that the substance possessed was one of the prohibited forms of cannabis. The relevant part of the information is as follows:

"...on the 27th day of March, A.D. 1955, at the City of Chicago aforesaid did then and there have in his possession and under his control, cannabis, known as marijuana, otherwise than as authorized in the Uniform Narcotic Drug Act of the State of Illinois, then in force and effect. In violation of Par. 192.2, Chap. 38, Ill. Rev. Stat. 1953, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the People of the State of Illinois."

The statute under which the defendant was prosecuted provides as follows:

"It is unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized in this Act." Ch. 38, par. 192.2, Ill. Rev. Stat. 1953,

With reference to the first contention, the cases cited by the People support their position that words such as

"unlawfully," "wilfully," "feloniously," and "maliciously" must only be stated in an information or indictment when they constitute part of the statutory definition of the offense. People v. Crump, 402 Ill. 204; People v. Stricker, 258 Ill. 618; Quigley v. People, 3 Ill. 301. Thus an information can be sufficient without the use of such words, as long as the charge is made in the language of the statute and incorporates all the necessary elements of the offense charged.

The defendant does not dispute this rule, but contends that since the word "unlawful" appears in the statute that word or one of similar import must appear in the information. A logical examination of the statute does not lead to that result. The word "unlawful," as used in this statute, is not descriptive of a particular element of the offense involved. The phrases "It is against the law," "It is prohibited," or "It is punishable" could replace the phrase "It is unlawful" in this statute, and the elements of the crime would in no way be changed.

When a statute is phrased in language such as "Murder is the unlawful killing of a human being..." (ch. 38, par. 358, Ill. Rev. Stat. 1955), or "If two or more persons assemble for the purpose of...committing any unlawful act..." (ch. 38, par. 507, Ill. Rev. Stat. 1955), the word "unlawful" describes the conduct that is prohibited and therefore constitutes, in itself, a necessary element of the offense. In such instances the word "unlawful," or words of similar import, are necessary

to a valid indictment or information. People v. St. Clair, 244 Ill. 444. What necessary element does the word "unlawful" describe in the statute in question? None. It in effect says no more than that a violation of this act is a violation of the law. Unauthorized possession constitutes the violation, and an information charging possession, "otherwise than as authorized" by the act, sufficiently apprises the defendant of the nature of the charges against him.

Defendant argues that many persons can legally possess a narcotic drug, otherwise than as authorized by the act, and thus the word "unlawful" must be used to distinguish criminal possession from such legal possession. Reference is made to the freight handler, police chemist, and the lawyer in court. We are not impressed by this argument. The word "unlawful," as used in this statute, is not intended to distinguish any particular acts of any particular persons. It simply serves the purpose of generally prohibiting violations of the act. The examples listed by defendant are custody situations and do not fall into the category of "possession" as contemplated by the act. We conclude that the word "unlawful" is not necessary to a valid information charging violation of the Uniform Narcotic Drug Act because it is not actually part of the statutory definition of the offense.

Defendant cites People v. Sowrd, 370 Ill. 140, in support of his second contention that the information is void because it failed to describe the cannabis possessed as being in one of the forms prohibited by the statute. In that case

the defendant was charged with the illegal possession of "marijuana" and his conviction was reversed by our supreme court because the information was insufficient. The Narcotic Drug Act of 1935, then applicable, stated that cannabis (marijuana) was a narcotic drug; but only certain forms and qualities of cannabis were included in the statutory definition of that substance. The court, in the Sowrd case, held the information to be inadequate and void because it did not state that the marijuana possessed was of the specific quality defined and prohibited by the statute. The court said that such description was an essential element of the offense which had to be alleged as well as proved.

In People v. Yeargain, 3 Ill.2d 25, it was pointed out that subsequent to the Sowrd case the section defining cannabis was amended to specifically list those forms of the substance which are not included in the statutory prohibition, as well as those which are included. Ch. 38, par. 192.1, sec. 13, Ill. Rev. Stat. 1953. The court, in the Yeargain case, said at p. 27:

"A comparison of the wording of these two subsections readily discloses the inapplicability of People v. Sowrd to the present statute.... Comparison of these two definitions shows that under the 1935 statute cannabis of a specific quality and kind was subject to the prohibitions of the act, while under the statute as amended in 1949 all cannabis was subject to the act, excluding the specific exceptions."

The court then quoted section 21 of the Act (ch. 38, par. 192.21, Ill. Rev. Stat. 1951), which provides that it is not "necessary to negative any exception, excuse, proviso, or exemption, contained in this act," in the

all "technical" and "policy" issues raised by the

And, before we begin, I'd like to say that I'm very pleased to be here.

at the time and place of the alleged crime.

and to be subject to any measure to be taken by the Council.

and it, being not connected with anything, is

There has been a great deal of discussion about the possibility of a

no. 100, published by the U.S. Dept. of Agriculture, Bureau of Entomology and Plant Quarantine.

Figure 1: \mathcal{P}_1 and \mathcal{P}_2 are the two partitions of \mathcal{P} that are induced by the \mathcal{P} -partition $\mathcal{P}_1 \cup \mathcal{P}_2$. The \mathcal{P} -partition $\mathcal{P}_1 \cup \mathcal{P}_2$ is a \mathcal{P} -partition of \mathcal{P} .

Journal of Management Studies, 19(1), 67-80.

1. 1990年12月15日，在《人民日报》发表署名文章《中国要警惕“新左派”的泛滥》，指出“新左派”泛滥的危险。

Journal of Management Studies, 37(6), 809–826.

1. 1947年10月1日，中华人民共和国成立，标志着中国历史翻开了新的一页。

Journal of Management Inquiry 18(6)br/>DOI: 10.1177/1056492609356111
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$\frac{d}{dt} \left(\frac{\partial L}{\partial \dot{x}} \right) = \frac{\partial L}{\partial x}$

-5-

information, and that the burden of proof of any such exception shall be upon the defendant.

The decision in the Yeargain case is controlling and we find that the information was not rendered insufficient by omitting a description of the cannabis possessed.

Defendant further contends that he was sentenced for an offense not charged in the information. We have examined this contention and find that it has no merit.

The verdict of the trial court is affirmed.

Affirmed.

McCormick, P. J., and Schwartz, J., concur.

General No. 10900

Agenda No. 14

FILED

APR 3 - 1956

JUSTUS L. JOHNSON
Clerk Appellate Court Second Dist.

Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

February Term, A.D. 1956

9 I.A. 570

THE PEOPLE OF THE STATE OF
ILLINOIS,

Plaintiff and Defendant-in-Error,

vs.

ERNEST LOUIS LINDSTROM,

Defendant and Plaintiff-in-Error.

APPEAL FROM

THE CIRCUIT

COURT OF LAKE

COUNTY, ILLINOIS.

DOVE, P. J.

In the Circuit Court of Lake County to an indictment charging the defendant with having knowingly received stolen property, of the value of \$42.00, the defendant entered a plea of not guilty. Upon the trial of the issues thus made, the jury returned a verdict finding the defendant guilty as charged in the indictment and fixing his punishment at imprisonment for a term of thirty days and assessing a fine of \$1000.00. The trial court, after overruling motions for judgment notwithstanding the verdict and for a new trial, rendered judgment on the verdict, and the defendant brings the record to this court for review by a writ of error.

Inasmuch as counsel for plaintiff in error insists that the verdict of the jury was against the manifest weight

FILED

APR 3 - 1956

JUSTUS L. JOHNSON
Chief Appellate Court Second Div.

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of the evidence and that therefore the judgment should not be permitted to stand, it will be necessary to review the evidence.

Donald Duffy, at the time of the trial, was twenty years of age. After being granted immunity from indictment, prosecution and punishment on account of any transaction concerning which he might be required to give evidence, Donald testified that he graduated from grade school and after attending high school for two years entered the employment of the National Tea Company at Deerfield in August or September, 1952 as a stock clerk and worked there until June 6, 1954; that he later became a checker, bagging articles purchased and receiving from the buyer the purchase price of the articles bought; that in the early part of January, 1954, he stole a set of store keys from the coat pocket of the assistant manager while the coat of the assistant manager was hanging in the back room of the store; that he took the key for the front door of the store off of the key ring, had a duplicate key made, and then replaced the original key, which he had stolen, upon the key ring and into the pocket of the coat of the assistant manager; that defendant was a frequent customer of the National Tea store at Deerfield, and Duffy was not an infrequent customer of defendant's tavern and that they became acquainted in July, 1953; that in February, 1954, while Duffy was at defendant's tavern, he, Duffy, asked the defendant what he paid for cigarettes, and defendant replied, "\$1.90 a carton"; that Duffy then told defendant he could get them for him for \$1.50 a carton and defendant then inquired of Duffy, "if there was any risk involved," or, "were they stolen," and Duffy assured him that they were not stolen and no risk involved, stating that the company he

worked for had an over-supply. Duffy then testified that he told defendant that the wholesale cost of a carton of cigarettes was \$1.50 and that he, Duffy, was able to furnish them to defendant at that price and defendant told Duffy that he would buy some. Duffy then testified that he, Duffy, accompanied by his friend, Russell Sweeney, went to the National Tea store in Deerfield, entered with his stolen key and procured a supply of cigarettes of various brands and returned to the tavern and delivered them to defendant and received the purchase price of \$1.50 a carton from the defendant.

further

Donald Duffy/testified that three or four weeks later a similar transaction took place and Duffy delivered to defendant, at his tavern, /between eleven and twelve o'clock in the evening between eight and fifteen cartons of cigarettes, which he had stolen from the National Tea store where he was employed and received from defendant \$1.50 for each carton. Donald further testified that upon another occasion in March, 1954, he, Duffy, was in defendant's tavern and a customer came in and asked for a certain brand of cigarettes which defendant did not have on hand, and Duffy, thereupon, offered to get some. Upon that occasion, defendant gave him a list of six brands and asked Duffy how he was going to get them, as it was after closing hours, and Duffy told the defendant that he had a key. Duffy then left, in returning/about a half hour with six cartons, bringing them in the side door and placing them on a table near the bar. For these six cartons defendant paid Duffy \$9.00. Duffy further testified that defendant's next purchase was in April, 1954, at which time defendant gave Duffy a written list of brands for either eight or ten cartons, which Duffy procured from the store

in the same manner as previously and returned to defendant's tavern, entering through the side door of the tavern and placed the box containing the cartons on the bar or a bar stool and received the purchase price from the defendant. Upon another occasion in May, 1954, defendant again ordered either ten or twelve cartons of cigarettes from Duffy, which were delivered by Duffy to defendant at his tavern between ten and eleven o'clock in the evening and defendant paid for them out of the cash register at the rate of \$1.50 per carton.

Duffy further testified that on one occasion, the latter part of March or first of April, 1954, he was in defendant's tavern in the evening and asked defendant if he wanted or needed cigarettes and defendant replied that he did and defendant then inquired of Duffy whether it was possible for Duffy to get him some meat. Duffy replied that he didn't know of any reason why he could not and Duffy asked defendant if he could use some coffee and later asked him if he could use some butter and bacon and defendant replied that he could use a small quantity of butter, bacon, some steaks and roasts and a case of coffee and these items were thereafter stolen from Duffy's employer and by him delivered to defendant and paid for by defendant at amounts substantially lower than the regular retail prices.

Duffy further testified that upon the several occasions when he entered the store of his employer in the evening, stole the cigarettes, ^{coffee,} bacon, meat and butter, which he afterwards delivered to defendant, he was accompanied by Russell Sweeney; that Sweeney entered the store with Duffy and together they carried the merchandise to Duffy's car and then drove to

defendant's tavern and, upon their arrival at the tavern, Sweeney remained in the car while Duffy took the merchandise into the tavern returning to the car shortly thereafter, and, upon his return to the car he, Duffy, gave Sweeney a portion of the money received by Duffy from the defendant.

Upon cross-examination Duffy testified that he stole the key to the store two months before he ever sold the defendant any stolen property; that defendant never asked for any explanation as to how he happened to have a key to the store; that he never discussed with defendant the means he employed to get the property from the store and never told him that it was stolen property; that Russell Sweeney was not employed by the National Tea Company at its store in Deerfield but was employed by the same company at its store in Glencoe; that he told Sweeney he had stolen the key to the Deerfield store and had a duplicate key made, and while Sweeney was with him in the Deerfield store he was not present in defendant's tavern when he delivered the stolen merchandise to the defendant, and that the defendant had never been advised by Duffy that Sweeney was in anyway implicated in the transactions. Duffy further testified that he made one delivery of cigarettes in January, one in February, two in March, and that sometime during the month of April or May he told the defendant he was going on a trip to California and when he didn't go, the defendant asked him about it, and he told the defendant he had to postpone his vacation because the manager was going away and both he and the manager could not take their vacations at the same time but denied that he ever told the defendant that he was the assistant manager

of the store. Upon redirect examination, Duffy testified that he never took any of the stolen goods which he delivered to the defendant into the main barroom or public room of the tavern but took them into the back room of the tavern, which was a little shed where the defendant kept his empty and full cases of liquor. Upon recross-examination, Duffy testified that as a rule when he took the stolen merchandise in the back room, he went through the back door into the kitchen, and that there was a door between the kitchen and the barroom.

Russell Sweeney testified that he was nineteen years of age and was employed at the Sunset Foods in Highland Park as a meat cutter; that in the summer of 1952 he was first employed by the National Tea Company and worked in the meat department of that store at Deerfield, Illinois; that he was acquainted with Donald Duffy and had known him since 1952; that he was also acquainted with the tavern of the defendant and had been there in company with Donald Duffy upon several occasions but had never gone inside. This witness further testified that he entered the National Tea Company store at Deerfield in the nighttime with Donald Duffy on several occasions, gaining entrance by key which Donald had; that nobody else was in the store at the time they entered it, as the store was closed; that while in the store they took some cigarettes from the store and took them to the defendant's tavern, and Duffy took them from the car and entered the back door of the tavern while Sweeney waited for him in the car; that when Duffy returned he didn't have the cigarettes with him but did have some money, and the witness received a portion of that but did not recall just

how much. This witness further testified: "I accompanied Donald Duffy into the National Tea Store in Deerfield, Illinois on other occasions. I had an occasion to be in the National Tea store in Deerfield with Donald Duffy in the months of January, February, March, April, May and June of 1954. There were approximately nine or ten occasions when I entered the store with Donald Duffy during those months. Entry was gained to the store with the key which he had. After entering the store, we usually got a large box and filled it with cigarettes and carried it out, locked the door and delivered them. We had occasion to take some other things besides cigarettes, such as coffee, meat, bacon, porterhouse steaks and once a rib roast. After we took these items, they were also delivered to the 'Nineteenth Hole' (the name of the defendant's tavern). After we took them out of the store, we put them in the car and drove to the 'Nineteenth Hole' and then Duffy took them inside and came out and gave me half of the money which he got. Donald Duffy took the items into the 'Nineteenth Hole' when we arrived there. I never took them in. On or about June 1, 1954, I had occasion to enter the National Tea store in Deerfield, Illinois. Donald Duffy was with me. It was late in the evening -- I would say around eleven o'clock and maybe twelve. We gained entrance to the store with the key which Duffy had. It was a key which he had had made. At that time, we got the cigarettes and I believe there was some meat that time -- some porterhouse steaks -- I think about six porterhouse steaks. I got the meat. I took it right from the meat counter. It wouldn't be missed there. After we took the meat from the meat counter we wrapped it up and

took it with us. I did not weigh these steaks, but I could tell -- about nine or ten pounds for the six of them -- that was the total weight. At that time porterhouse steaks were selling for about one dollar a pound -- ninety-nine cents possibly. We also took cigarettes, coffee and porterhouse steaks. On June 1, 1954, there was some bacon. We took five or six pounds of bacon. We took some butter -- I can't recall how much it was -- possibly three or four pounds -- it was never more than that. I did not take the butter myself. Duffy got that. I also took five or six pounds of bacon, the porterhouse steaks and then around twelve or fourteen cartons of cigarettes. After we took these items, we wrapped them and put them in a box and carried it out to the car. We then drove to the 'Nineteenth Hole.' When we arrived at the 'Nineteenth Hole,' I waited in the car. Duffy took the items inside. Duffy subsequently returned to the car. When he returned to the car, he gave me some money. I do not know exactly how much money he gave me. He went in the back door." Upon cross-examination, this witness testified that he never went inside the "Nineteenth Hole" and was not acquainted with the defendant, knew nothing about the layout of the "Nineteenth Hole"; that he never saw Duffy go in the "Nineteenth Hole" except by the back door; that the total number of times that he went in the National Tea store with Duffy after hours was either nine or ten; that in January, they took nothing but cigarettes from the store, but around March or April they began taking coffee and in March or April took a case of coffee.

The door lock of the National Tea Company store at Deerfield and the key which was obtained by the Highland Park

police department from Duffy were offered and admitted in evidence as were several packages of cigarettes bearing the notation "National Tea Company" with a certain tax meter number stamped on the cellophane wrapping of the packages which identified these packages as the property of the National Tea Company but which had been purchased at the defendant's tavern.

The People also introduced in evidence a statement of the defendant taken on June 9, 1954, to the effect that on the first day of June, 1954, he purchased a quantity of cigarettes, meat and butter from Donald Duffy for which he paid about \$25.00 and that this amount was not paid out of the cash register. In this statement defendant also admitted that he had purchased cigarettes three times from Duffy and had purchased twelve pounds of coffee from him. The evidence also discloses that there were certain tax meter numbers on the cigarettes sold by the National Tea Company and the name of the company was stamped on the cigarettes. Evidence was also introduced that the lowest wholesale cost of cigarettes to the National Tea Company during the period covered by these transactions was \$1.92 a carton and that the lowest retail sale price of cigarettes was \$2.07 a carton. The evidence also discloses that the National Tea Company bought their cigarettes from the manufacturers and that the price they paid was equal to the price paid by others during the same period. There was other evidence that the prices paid by defendant for coffee, butter, steaks, bacon, and rib roasts were substantially lower than the current retail prices for such articles.

The defendant called George Stanclift, Gustav Stoerp, Robert Gleason, and Francis Hutchins, each of whom testified that they were acquainted with the defendant and had been for some time and that his reputation for honesty, integrity, and veracity was good in the neighborhood in which he lives. Arthur James also testified on behalf of the defendant to the effect that he was employed at the "Nineteenth Hole" by the defendant, his employment beginning the first week of March, 1954, and continued until September of that year. This witness further testified that he knew Donald Duffy and that during the period he worked for defendant, he had seen Duffy on twelve or thirteen occasions and that Duffy brought merchandise in the place a couple of times and that on one occasion he brought a package of some sort and at another time he brought a carton of cigarettes. This witness further testified that the tavern had a side entrance facing a parking lot and also a back door which was kept locked. This witness further testified that in the first conversation that he had with Duffy, Duffy told him that if he, James, wanted cigarettes, that he could get them for him for \$1.50 a carton or if he, James, needed anything he would pick it up for him at wholesale, as he was the assistant manager of the National Tea store and that their inventory became too high and they had to unload in order not to get in trouble with the head office. Upon cross-examination, he said that when Duffy brought merchandise to the bar, he did not know what was in the package and he never looked into any of the packages, never called the defendant, and was unable to give the dates when Duffy was ever in the tavern, and that at each time Duffy came

into the tavern he purchased something, usually beer, but would have very few drinks, maybe two, and would occasionally play a game of shuffle board.

The defendant testified in his own behalf that he was born on March 21, 1908, attended grade school and graduated therefrom in 1922; that he thereafter attended the Highland Park high school for two years, helped his parents on their farm, and worked a year for the Benjamin Electric Company at Des Plaines and afterwards enrolled in a technical school in Milwaukee and graduated from that school after two years' attendance, was drafted in the Navy and, after serving almost two years, was honorably discharged; that he is married, living with his wife and three children, and thereafter took a job with the Country Club as maintenance man and subsequently worked as a carpenter about a year and then as a machinist and was then employed by the Chevy Chase Country Club, where he worked as a carpenter; that in July, 1953, he became the proprietor of the tavern known as the "Nineteenth Hole," which he continued to operate until December, 1954, when he sold it.

The defendant then testified that he first became acquainted with Donald Duffy when he took over the "Nineteenth Hole" in July, 1953; that he saw him at the "Nineteenth Hole" and in other taverns and also at the National Tea store at Deerfield; that his first conversation with him was in July, 1953; that in the early part of 1954, Duffy told him he was student manager of the National Tea store and subsequently told him that he was the assistant manager. As abstracted, the testimony of this witness continues: "From January, 1954, to June 1, 1954, I would estimate that I saw him four or five times

~~xxxx~~ a month in the tavern, perhaps oftener. Sometime in February he asked me what I paid for cigarettes. I told him around \$1.98. He said he could get them for me for \$1.50. I asked him if they were stolen and he said, 'no, they were not.' I did not believe he could get them for me for \$1.50, but he said they were not stolen. He said it was an over-supply. He said that was the wholesale cost. I did not buy any merchandise from him in February of '54. After the first conversation with him in February of '54, I had a further conversation with him. He would ask me every time, almost, if I could use some cigarettes. He did this, oh, once a week. The first time I purchased anything from Duffy was around the first of March on a Friday in '54. It was Friday evening, as I recall, and someone asked for a brand of cigarette and I told him we were out of them and Duffy offered to get me some. He asked me what I wanted and I looked the stock over and then gave him a list of six brands and I asked him how he was going to get them, it was after closing hours, and he said he had his key -- there had been a previous -- he had told me about the key before. That conversation must have been in February or so -- no, it may have been before, the early part of February, and the occasion was, he had come into the tavern for a sandwich or something like that, I do not know -- it was early, about eight o'clock, and he said he was going back to work and I said 'Is the store open tonight' wondering how he could get in and he said, no, he had a key. He did not go back to the store for me that night. On this occasion I speak of, when I told him I was short of supply, I wrote something on a slip of paper. He did not tell me what he was going

to do with that slip of paper. He never told me that he had destroyed that slip of paper. On that occasion, I did not believe that he was stealing the cigarettes. After he volunteered to go back and get this merchandise, he came back to the tavern about half an hour later. He had something with him. He came in the side door off the parking lot. This door from the parking lot is the principal door. He brought this merchandise in and sat it on a table there adjacent to the bar. There were other people in the tavern at the time -- five or six, I would say. I do not recall the names of any of the people who were there. I paid him for the merchandise -- I believe it was \$9.00. There were six cartons of cigarettes. I paid him right at the bar from the cash register. The next occasion that I purchased anything from or through Mr. Duffy was in April, 1954. It was about four weeks after the first occasion, I would say, approximately. Well, he would ask when he come in -- he would usually come in early in the evening and he would ask if there was anything I wanted -- he would ask once a week or maybe once every two weeks. On this next occasion I gave him a slip for some cigarettes I needed. This second occasion occurred in April. I recall the occasion for it. He asked if I needed anything and I checked and found I could use some cigarettes and I think I ordered eight or ten cartons -- I don't recall now, at the moment, the exact amount. I wrote out the order on a slip of paper, the brand names. During the period of March and April, '54, besides seeing him in the 'Nineteenth Hole,' I saw him in the National Tea Store in Deerfield. He was working in the store. On this second occasion, I did not believe that he was stealing the merchandise. I did not suspect that he was stealing the

merchandise which he delivered to me on the second occasion. When he brought in the merchandise on the second occasion, he came in from the parking lot through the side door. As he came in, he had the merchandise right with him. I do not know on this occasion whether I was there -- or if the bartender was there -- I might not have been there at the moment. There is a back door to the tavern. It was locked after dark. On this occasion in April of 1954 the back door was locked at the time that Duffy came into the tavern. On the other occasions when Duffy came into the tavern, bringing merchandise, the back door was closed. The second purchase of merchandise consisted of cigarettes. There was about eight or ten cartons. I do not recall at the moment. I don't recall how much I paid him. On this occasion in April, '54, I said I may not have been there in the tavern -- I was in the kitchen, as I recall. I was in the kitchen and not in the barroom. On that occasion, I was called out. I asked Donald Duffy how much I owed him and he told me and I went to the cash register and got the cash and gave it to him. He didn't come in through the back door. The merchandise was not taken in through the back door. The merchandise on this occasion in April, was either on a bar stool adjacent to the bar or on the bar. I do not recall which. The next occasion after that that I bought any merchandise from or through Donald Duffy was in May of 1954. I had a conversation with him at that time. He asked me if I needed any cigarettes and I checked and saw what I needed and gave him an order for them. Between this April purchase and May purchase, I had seen Duffy in the 'Nineteenth Hole' about twice a week. He played shuffleboard a great deal

and on Friday nights, he sometimes would stay until closing hours. At times, he would come in with other people. On this occasion, I gave him an order at that time. That order was for cigarettes. I gave him the order in writing. He never gave me back any slip on which the order was written. I do not know what he did with the slip and he didn't tell me. On this occasion in May, I did not order anything besides cigarettes. He came back after I had given him the slip. He brought back the cigarettes and he had a case of coffee with him. I had not ordered a case of coffee. He said he had a good deal on it and I said I wouldn't use a case of coffee in, oh, six weeks. He insisted it was a good deal and that I should take it. I did not suspect or believe that he had stolen that coffee. I did not suspect or believe that he had stolen the cigarettes. On this occasion in May when I gave Duffy the order, I was in the 'Nineteenth Hole' tavern in the barroom. There were other people present. They were patrons. I handed him this slip of paper at the bar and after I gave him that order, he said he was working that night and he would bring the merchandise over afterwards. He came back with the merchandise that evening about ten or ten-thirty. I don't recall the exact time. I don't recall whether I saw him come in with it or whether I was in the back room. I either saw him or I was called and told he was there. When I saw Mr. Duffy, the merchandise was on the bar stool or something like that in the barroom proper. I asked him how much it was and I paid him. This discussion relative to the coffee was held at that time. He charged me \$18.00 for the case. I do not recall how much he charged for the cigarettes. It was the number of cartons that were in the order. I do not

recall how many cartons there were. It would be ten or twelve, something like that. The next occasion after May, 1954, was in the first part of June. Between the occasion in May and the one in June, I had a discussion or spoke with Mr. Duffy relative to my buying merchandise from him. At that time after the coffee incident, he said it wouldn't have to be cigarettes alone; that he could get other things. During that period of May to June, 1954, I went to the National Tea store once a week, I would say. I purchased merchandise there. On the occasion in June, 1954, he asked if I needed any cigarettes and I gave him an order written out and he asked about other things. He said he could get them - - butter, bacon, meat -- he suggested a lot of things. He said he could get them and deliver them to me. At the time I was short on steaks and I gave him an order. I ordered cigarettes, butter, bacon. I believe it was fourteen cartons of cigarettes, six pounds of butter. I think he brought me three pounds, also three pounds of bacon, I believe, and then six porterhouse steaks. I gave him this order in writing and not verbally. I gave him this order in the 'Nineteenth Hole' tavern in the barroom at the bar. I had a conversation with him as to his delivery of this merchandise. I said to take it around to the back, that we would put it right in the refrigerator there and it would be just as convenient that way. He said he agreed and when he came back, he came into the tavern. I went from the tavern through the kitchen and opened the back door for him and he came in that way. The perishables went into the refrigerator. This was the only occasion, in June, 1954,

when he came in through the back door. I paid him for the merchandise. I asked him how much it was. I did not check it over. I don't recall the amount now. I paid him at the bar. I went back into the barroom then. I took the money to him from the cash register. After June 1, 1954, I never bought any merchandise by or through or from Mr. Duffy. The first I learned that the merchandise which Duffy had delivered to me was stolen was when the police served me with a warrant. At that time the lieutenant told me it was stolen merchandise. Captain Lempinen explained that Duffy had been stealing some merchandise and that I had got some of it and he wanted to search the place and I said, 'go right ahead.' I made no objection to their searching the place and they proceeded then to search my place and they took the cigarettes which have been identified here."

Upon cross-examination, the defendant testified that the first time he purchased any cigarettes from Duffy was in March and that his next purchase was in April and his next purchase in May and that he paid \$1.50 per carton for the cigarettes he purchased; that there were only four deliveries made to him by Duffy and that during the period when he purchased cigarettes from him, he was also buying cigarettes from a supplier who came around with a truck and delivered his purchases and that he paid the supplier \$1.98 a carton. The defendant further testified that the only time he ever purchased any meat from Duffy was in June, 1954, and that at the time he delivered the coffee to him, he also delivered some cigarettes, ten or twelve cartons; that when the coffee was delivered to him, he saw the brand name on the cans but did not recall seeing any indicated price markings.

Defendant stated that he knew the cigarettes that he was purchasing came from the National Tea store; that he had purchased cigarettes at retail at the National Tea store and had paid \$2.07 a carton or whatever the price happened to be at the time he made his purchase; that he was acquainted with the price of food stuffs during the period when he was making purchases from Duffy; that the steaks were delivered the same evening they were ordered, but he never had any understanding or conversation with Duffy as to the price per pound of the steaks, butter, or bacon, and that nothing was said about the price until after they were delivered and then he asked Duffy how much he owed him for them and was told the amount and he paid it; that the coffee was not ordered by him and that there was no conversation with Duffy about getting coffee from him, but that Duffy said he had a case of coffee in the car and he "asked if I could use some coffee and I asked him how much and he said seventy-five cents. I did not know how much it was; I asked him about that and I said it was a lot of coffee, it would be a long time before I could use it and there was more conversation and then finally I said 'all right, I will take it.'"

The indictment upon which plaintiff in error was tried charged him with receiving fourteen cartons of cigarettes, six porterhouse steaks, six pounds of bacon, and six pounds of butter feloniously stolen from the National Tea Company, knowing that the same had been so stolen. Proof of the purchase of other commodities at other times by plaintiff in error from Duffy were proper as evidence of plaintiff in error's guilty knowledge. (Lipsey v. The People, 227 Ill. 364, 380.)

The evidence here discloses that plaintiff in error purchased the stolen cartons of cigarettes for \$1.50 a carton which was forty-seven cents less than he had been purchasing the identical item from his regular supplier, jobber, and wholesaler. He also purchased twenty-four pounds of coffee at seventy-five cents a pound, the cans in which it was contained being marked, according to Duffv's testimony, to sell at prices between ninety-nine cents and one dollar and twenty-five cents per pound, and other evidence discloses that these were the prevailing retail prices. All the other stolen commodities were likewise sold at far less than their value.

In Huggins v. The People, 135 Ill. 243, the defendant was convicted of knowingly buying a stolen diamond ring. He admitted that the ring he purchased was stolen, but he contended he had no knowledge of that fact at the time he bought it. The court, after stating that it was necessary for the People to prove the guilty knowledge of the defendant at the time of the purchase, went on to say that it rarely happens that direct and positive proof of the guilty knowledge of the defendant is attainable, but ordinarily such guilty knowledge is shown by proof of attending facts and circumstances from which, by the common understanding and experience of men, the inference of the fact arises and that the purchase was for much less than the real value is such a circumstance as may be shown. The court then said (p.246): "The knowledge of the theft need not be that actual or positive knowledge which one acquires by personal observation of the fact. 'It is sufficient if the circumstances were such, accompanying the transaction, as to make the prisoner

believe the goods had been stolen.' (Bishop on Crim. Law, 1138; Wharton on Crim. Law, 984) If he purchase or receive the goods with a belief that they were stolen, he will be held to have that knowledge required by the statute. The knowledge of the prisoner, in this sense, is the gist of the offense and must be found by the jury as a fact. In determining whether the fact existed, the jury will be justified in presuming that the prisoner acted rationally and that whatever would convey knowledge or induce belief in the mind of a reasonable person, would, in the absence of countervailing evidence, be sufficient to apprise the prisoner of the like fact, or induce in his mind the like impression and belief." (See also People v. Rubin, 361 Ill. 311, 328; People v. Boneau, 372 Ill. 194; Weinberg v. The People, 208 Ill. 15; People v. Grove, 284 Ill. 429).

Counsel for plaintiff in error call our attention to the fact that this conviction rests largely upon the testimony of Duffy and Sweeney, who admitted they committed the larceny, and cite The People v. Gleitsmann, 361 Ill. 165, where the court, speaking of the evidence given by accomplices, said (p. 169): "The law discredits the testimony of such a witness (1 Wharton on Am. Crim. Law, sec. 784.) it looks upon it with suspicion and it is the duty of the trial court to instruct and advise the jury of its unreliable character. . . . Accomplices, upon their own confession, stand contaminated with guilt. They admit a participation in the very crime which they endeavor, by their evidence, to fix upon the prisoner. They are sometimes entitled to even a reward upon obtaining a conviction and also expect to earn a pardon." But the court in the Gleitsmann case also said (p. 169): "Of course, if the jurors are convinced of the truth

of the testimony given by the accomplice they must then accept it as true and give it the same weight in arriving at a verdict as they would give to the testimony of any other witness upon whom they think they can safely rely." (See also People v. Mathews, 406 Ill. 35,41 and cases there cited.)

Counsel also call to our attention the case of The People v. Vehon, 340 Ill. 511, where the court said (p. 517): "This court has always regarded the testimony of an accomplice with suspicion, to be acted on with great caution, especially if awaiting trial or sentence for his own crime or if corroborated only in part by the testimony of respectable witnesses. (citing cases) In other words, this court recognizes the practical difficulty of convicting criminals without sometimes using the testimony of their associates. In such cases, the accomplices and their principals usually bear the same shady reputation, but the situation is different in this case, where the defendant is shown to be a respectable, law abiding citizen."

In the instant case the record discloses that ~~xxxxxxx~~ and ~~xx~~ Sweeney were ^{not} awaiting trial or sentence for the commission of the crime which they committed, ^{nor} ~~ex~~ ^{they} were expecting to receive any reward or favorable consideration from any source. The record discloses that upon the petition of the state's attorney, an order had been entered granting these witnesses immunity from prosecution and requiring them to testify. As a result of this order, they could not thereafter be punished or prosecuted for the offense about which they testified, but they could be punished had they refused to testify. They were obliged to testify. In

many respects, the testimony of Duffy, Sweeney, and plaintiff in error is in agreement. Only in a few particulars were they in disagreement. Duffy testified that eight deliveries of stolen merchandise were made to defendant at his tavern. The defendant says there were a total of four. In his statement made on June 9, 1945, he said, however, that there were only three. Duffy and Sweeney insist that deliveries were made at the back door of the tavern, while defendant says that all, with the exception of the delivery on June 1, 1954, were made in the barroom. As to the delivery on June 1, 1954, all agree that the commodities were delivered at the back door, and all agree as to the items delivered and the circumstances of the delivery.

It is upon the sole ground that the defendant testified that he did not know this property was stolen and that Duffy testified that he never told defendant he had stolen the property that counsel for plaintiff in error base their argument for a reversal of this judgment. There is no contention that the evidence does not disclose that the merchandise involved in this proceeding was stolen or that the defendant received this property for his own gain. It is not insisted that there was any misconduct upon the part of the state's attorney or that the trial court erred in the admission or rejection of evidence or in instructing the jury as to the applicable law. Whether defendant knew this property was stolen at the time he purchased it was a question of fact for the jury. We have set forth quite fully the evidence found in this record. It discloses that the defendant is a well-educated, experienced business man, more than forty-six years of age; he was contacted by a nineteen-year-old boy whom he knew to be working in a grocery store as a stock

clerk, vegetable handler or a checker; he purchased not only cigarettes, but meat, steaks, bacon, coffee, and butter at prices which he knew were substantially below the regular retail market prices prevailing at the time he purchased them. These sales were not in any sense ordinary business transactions. They were made under circumstances which would cause the most gullible person to be wary. To give credence, as plaintiff in error says he did, to a statement of a nineteen-year-old clerk that the large store he was working for was over-stocked with staple merchandise, such as cigarettes, bacon, butter, and coffee, and that in order to reduce the surplus it was necessary for such a clerk to sell these commodities in the manner and at the time and places where the evidence discloses these commodities were disposed of, is incredible. From all the evidence and circumstances appearing in evidence, we are not prepared to say the evidence was insufficient to warrant the verdict which the jury returned.

It is true plaintiff in error offered evidence tending to prove his good reputation as a law abiding citizen, but this, under the authorities, is simply a circumstance to be considered by the jury in connection with all the other evidence in the case in determining the guilt or innocence of the defendant. If guilt is clearly established, proof of good character or reputation avails nothing. (~~The~~ People v. Bartz, 342 Ill. 56, 67).

Plaintiff in error knew the commodities he bought came from a sizeable store. He testified that Duffy told him he was assistant manager. Duffy denied this. Plaintiff in error was a frequent customer at that store. He knew the character of the

~~xxxxxx~~ work Duffy was doing there. The jury were warranted in finding that plaintiff in error knew he was acquiring stolen property, notwithstanding his positive denial and notwithstanding his previous good character. That he himself at least suspected these commodities were stolen is disclosed by his inquiry to Duffy, "Is this property stolen?"

After a careful consideration of this record, we are unable to say that the evidence is insufficient to authorize the verdict which the jury returned. The judgment rendered upon that verdict must therefore be affirmed.

Judgment affirmed.

Conaldi J. Concur
Craw J. Concur.

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9 I.A. 371

RICHARD MILLER d/b/a JOHNSON'S
FAIR,

Appellant,

v.

INTERSTATE BEDDING COMPANY, INC.,

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

JUDGE KILEY DELIVERED THE OPINION OF THE COURT.

Plaintiff was given leave to appeal from an order granting defendant a new trial in a suit for breach of contract for sale of cots. The case was tried without a jury, with finding and judgment for plaintiff, on count one of the complaint, for \$5,700.00.

The parties made the contract June 15, 1951. Defendant agreed to sell plaintiff 1,800 single brace cots at \$3.00 each and 2,000 triple brace cots at \$4.00 each. Delivery was to be at Belts Wharf Warehouse in Baltimore, Maryland. Plaintiff paid \$1,000 deposit under the contract, which provided that the parties would "arrange further payment satisfactory to each and all upon/or before delivery." And "delivery and payment shall be completed on or before July 3rd, 1951, as agreed."

Plaintiff's check for \$1,000 was cashed by defendant and at the warehouse in Baltimore on July 2, plaintiff tendered the balance due. The tender was refused, defendant refused to deliver the cots and plaintiff brought this suit.

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Richard Little & Co. Merchants
London

London

Applicant

Subsidiary

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JOHN D. DUFFY

THE FIRST NATIONAL BANK, INC.

Applicant

THE FIRST NATIONAL BANK, INC.

THE FIRST NATIONAL BANK, INC.

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The point is made that in a nonjury case a new trial is "neither required nor authorized." Atlas Finishing Co. v. Anderson, 336 Ill. App. 167. The court, however, granted a new trial, and in allowing plaintiff to appeal we determined this was proper practice to review the trial court's action. Defendant in arguing to limit the scope of our review of the order for a new trial states that its motion for new trial was in effect a motion to vacate a judgment. A difference is that an appeal would not lie in this instance from an order granting a motion to vacate the judgment.

The question is whether the new trial was properly granted. Defendant's motion for new trial made four points, two of which covered alleged illegality of the transaction and have been abandoned. The two pertinent points were that the decision was contrary to the evidence and contrary to law. The order of the court indicates the new trial was granted on these points.

The question with respect to the law concerns interpretation of the contract. We think the trial judge correctly interpreted the contract, as we presume he did, in the original finding; and that if he interpreted the contract in the opposite manner in granting the new trial he committed error.

On the day the agreement was made by the parties in Baltimore, defendant's president wrote plaintiff "confirming" the sale but requiring payment of the balance due "on receipt of our invoice No. 867, and prior to June 21st 1951"

Q. Now, you're going to tell me that the defendant was not the person who was in the car that was involved in the accident, is that correct?

Journal of Management Studies, 19(1), 67-80.

-3-

Defendant on June 21 wired plaintiff for confirmation of the June 15th letter. Plaintiff's testimony at the trial was that upon receipt of the wire a telephone conversation resulted in an agreement for payment of the balance on July 3rd. This is disputed by defendant which insists it demanded payment on or before June 21st. Whichever view the court took of this dispute, we think that clearly the contract required plaintiff's agreement to a date prior to July 3rd and if there was no agreement, payment and delivery were to be made on that date. We think the court could not find that there was an agreement for payment before July 3rd.

With respect to the point that the decision was contrary to the evidence, this court has held that to cause a reversal of the order granting a new trial the appellant must show either a clear abuse of discretion "or that the evidence palpably supports the verdict." Village of LaGrange v. Clark, 278 Ill. App. 269, 286.

There was introduced into evidence in proof of damages a price list of defendant, mailed to plaintiff and bearing the words "Jobbers Net Prices August 1st, 1951." Defendant did not object to the introduction of the exhibit and defendant is in no position to complain of the admission of the evidence. Peabody Coal Co. v. Industrial Comm., 289 Ill. 449, 452.

Defendant argues that this exhibit did not prove, or tend to prove, the market value of the cots on July 3rd. The rule is that actual sales at the time of breach are the best evidence of the market value at that time, but in absence

of such sales evidence of other sales within a reasonable time before or after the breach is competent as tending to prove the fair market value; and a bona fide offer is competent in absence of actual sales. Behn v. So. Pac. Co., 2 Ill. App. 2d 62, 64-65, citing respectively to the rules, Farson v. Buder, 187 Ill. App. 318, 325 and City of Chicago v. Lehmann, 262 Ill. 468.

In addition to the price list, which asked prices of \$4.50 for single, and \$5.50 for triple, brace cots, plaintiff introduced into evidence paid invoices of his purchase of single brace cots from a New York City wholesaler in June, July, August, September, October and November, 1951 at a price of \$4.50. Testimony of defendant's witnesses of purchases in that area and their testimony with respect to prices in Chicago in May and August is, in our opinion, wholly insufficient to overcome plaintiff's proof. The record would not support another conclusion on the ground that the trial court observed the witnesses giving testimony in substantial conflict. The court's original finding of \$1.50 damages on each cot was right.

In our opinion the new trial should not have been granted.

For the reasons given the order is reversed and the cause remanded with directions to reinstate the judgment for \$5,700 entered on the original finding for plaintiff.

REVERSED AND REMANDED.

FEINBERG, J. CONCURS.

LEWE, P.J. TOOK NO PART.

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of which a few are mentioned in the text. The first of these is the "The Great Wall of China" which is a very famous work of Chinese literature. It is a long and detailed account of the history and culture of China. The second is "The Tale of Genji" which is a classic Japanese novel. It is a story of the life of a prince in the Heian period. The third is "The Tale of the Heike" which is a Japanese epic poem. It tells the story of the Minamoto clan's victory over the Taira clan in the late 12th century.

The fourth is "The Tale of the Genji" which is a classic Japanese novel. It is a story of the life of a prince in the Heian period. The fifth is "The Tale of the Heike" which is a Japanese epic poem. It tells the story of the Minamoto clan's victory over the Taira clan in the late 12th century. The sixth is "The Tale of the Genji" which is a classic Japanese novel. It is a story of the life of a prince in the Heian period. The seventh is "The Tale of the Heike" which is a Japanese epic poem. It tells the story of the Minamoto clan's victory over the Taira clan in the late 12th century.

The eighth is "The Tale of the Genji" which is a classic Japanese novel. It is a story of the life of a prince in the Heian period. The ninth is "The Tale of the Heike" which is a Japanese epic poem. It tells the story of the Minamoto clan's victory over the Taira clan in the late 12th century. The tenth is "The Tale of the Genji" which is a classic Japanese novel. It is a story of the life of a prince in the Heian period. The eleventh is "The Tale of the Heike" which is a Japanese epic poem. It tells the story of the Minamoto clan's victory over the Taira clan in the late 12th century.

The twelfth is "The Tale of the Genji" which is a classic Japanese novel. It is a story of the life of a prince in the Heian period. The thirteenth is "The Tale of the Heike" which is a Japanese epic poem. It tells the story of the Minamoto clan's victory over the Taira clan in the late 12th century. The fourteenth is "The Tale of the Genji" which is a classic Japanese novel. It is a story of the life of a prince in the Heian period. The fifteenth is "The Tale of the Heike" which is a Japanese epic poem. It tells the story of the Minamoto clan's victory over the Taira clan in the late 12th century.

Abstract

General No. 10917

Appendix No. 26

IN THE

FILED

APPELLATE COURT OF ILLINOIS

APR 5 - 1956

SECOND DISTRICT

JUSTUS L. JOHNSON

Clerk Appellate Court Second Dist.

February Term, A.D. 1956

9 I.A. 572

JOHN R. JEFFERS,

Plaintiff-Appellee,

vs.

EMMA E. JEFFERS,

Defendant-Appellant.

APPEAL FROM THE
CIRCUIT COURT OF
BOONE COUNTY.

DOVE, P. J.

From a decree granting John R. Jeffers, the plaintiff below, a divorce from Emma E. Jeffers on the ground of desertion and dismissing the counterclaim of Emma E. Jeffers for separate maintenance, the defendant and counterclaimant appeals.

The record discloses that the plaintiff at the time of the hearing in June, 1955, was sixty-five years of age and his wife fifty-seven. They were married on June 23, 1949, both having been previously married, and each was financially independent. The husband was the owner of 160 acres of land and considerable personal property and his wife owned a five-room residence property in South Beloit and also a farm of 160 acres.

FILED

APR 5 - 1955

JUSTICE L. JOHNSON
Clark Appellate Court Building

Upon the marriage of the parties they moved into one of the houses on the husband's farm, the other house being occupied at that time by the husband's son, Gerald, and his family. The parties continued to live on the farm until December 15, 1951, when they moved to the house belonging to Mrs. Jeffers in South Beloit. Apparently the parties lived together amiably and after they moved to South Beloit, the plaintiff made substantial improvements to defendant's property, expending thereon approximately \$6000.00. During the time the parties lived on the farm and after they moved to South Beloit and until November 13, 1953, Mrs. Jeffers' father, an elderly gentleman past eighty years of age, made his home with them. They kept a joint checking account in a Belvidere bank and a joint savings account in a bank at Beloit. Both parties paid household bills from the funds in the checking account.

In the fall of 1953, while living in South Beloit, plaintiff testified that he and his wife encountered some problems about starting his son in farming; that they had both agreed to start him farming when he came back from the army, but that later she said the plaintiff would have to start him alone and that she would not put her money in his boys. It was at this time the parties divided their money and defendant requested plaintiff to give her \$100.00 a month to run the house/^{and} in addition he pay the gas and electric bills. He further testified that about three weeks before he left, his wife ~~xx~~ told him to leave, repeating it quite often and that two weeks before he left, she said she would call the sheriff if he didn't get out, to which he replied that he'd go without that.

Julian VanLandingham lived next door across the street from the Jeffers, and on February 3, 1954, in response to Mr. Jeffers' request, Mr. VanLandingham accompanied Mr. Jeffers to the Jeffers' home where he found Mrs. Jeffers sitting in a chair in the living room. Upon their arrival there, Mr. Jeffers said, in the presence of both Mr. VanLandingham and Mrs. Jeffers: "I want you to hear what Emma has to say. She said it but I want you to hear it again." Whereupon, Mrs. Jeffers said: "Yes I did say it. I told him he should leave the house."

The defendant testified that Donald Jeffers, a son of her husband by a previous marriage, before he, Donald, was married and before he went to the army, worked on his father's farm and lived with her and her husband; that while they lived on plaintiff's farm they got along fine, and that the living expenses were paid by plaintiff and after they moved to her home in South Beloit, plaintiff repaired the house, bought a deep freeze and furnished money from time to time for groceries and supplies. She further testified that in September, 1953, she had a conversation with her husband about financing his son, Donald, on a farm; that her husband wanted her to take \$10,000 of her money to set up Donald in farming and said that if she did not do so, he was going to leave and get a divorce for incompatibility. She further testified that on February 3, 1954, she told her husband he could take his suitcase and leave and later that day told Mr. VanLandingham that she had told Mr. Jeffers "to get out"; that thereafter her husband packed his clothes and left and they have not lived together since that time. She further testified that he pinched her and called her a

fat, sloppy thing and an old Swede, and in return she called him an Irishman. She denied that she ever threatened to call the sheriff and insisted that after he left on February 3, 1954, and before the suit for divorce was filed, she asked him to return and he refused and that she wrote him a letter asking him to come back, but had had no reply to that letter.

Erma Reedy, related by marriage to Mrs. Jeffers, testified that in the spring of 1954, after Mr. Jeffers had left, he came back and Mrs. Reedy heard Mrs. Jeffers say to him, "Well, have you come home; are you going to stay?" to which Mr. Jeffers answered, "No."

Frank Sammarco, a next-door neighbor of the Jeffers in South Beloit, testified on behalf of appellee to the effect that the morning after appellee left his home he asked Mr. Jeffers what was going on, to which Jeffers replied, "Emma kicked me out"; that thereafter he had a talk with Mrs. Jeffers, who started crying but said nothing about ordering Mr. Jeffers out of the home. Edna Sammarco, Frank's wife, testified that Jeffers left in January or February, 1954, and that some months later she talked to Mrs. Jeffers and suggested that she "write to John to try to get together," and that upon a later occasion she said to both of them, "Why don't you forget this nonsense, forgive each other and go back and live with each other," but that neither of them made any reply.

A daughter of Mr. Jeffers testified that she called upon Mrs. Jeffers about a month after the parties separated and told her that Reverend Skindrud had asked her to see Mrs. Jeffers and endeavor to make a reconciliation between her and her father, but that Mrs. Jeffers "discouraged" her

and said she "would only have him back if she had plenty of spending money and he not be cross."

Viola Denner, Gladys Christopherson, Evelyn Hicks, Dorothy Whitlock, Mrs. John Anderson and Etta Rodson were called as witnesses on behalf of appellant, and each testified to the effect that they were neighbors and friends of the parties, had visited in their home, had never heard any quarrel and knew of no difficulty between them until after their separation; that they had observed that Mrs. Jeffers conducted herself as a true, kind and affectionate wife and that Mr. Jeffers treated his wife kindly.

According to the testimony of the plaintiff, he and his wife discussed setting his son up in farming in the fall of 1953, but he never asked her to take \$10,000.00 of her money for this purpose but suggested to her that they would take it out of their joint account; that it was not to be a gift to the son, but that they would loan this amount to the son at 4% interest and take a mortgage from him; that defendant became angry and replied she did not want to do it and that he never asked her about it any more. He stated that he did tell her she was spending too much money in maintaining the house, but denied that they ever talked about a divorce, denied he ever told her he wanted a divorce for incompatibility and denied that he told her he wanted to go his own way, denied that he ever said he was going to see an attorney about settling their difficulties, denied that he ever pinched her, denied that she ever asked him to come back after their separation in February, 1954, and denied that he ever received a letter from her between February 4, 1954, and February 4, 1955.

The record further discloses that appellee had twelve children by his previous marriage, appellant had none and no children were born as a result of the marriage which was dissolved by the decree appealed from. Appellee testified he had no intention of leaving appellant or the home where they were living until appellant ordered him to do so.

From the foregoing, which is a fair resume of the evidence found in this record, counsel for appellant contend that the desertion in this case was on the part of the plaintiff and not the defendant. Counsel insist that it is apparent that plaintiff wanted to separate from defendant when he found out that he could not get money from her for his son; that he frequently stated to his wife that he was going to get a divorce; that he systematically provoked her and quarrelled with her until she ordered him to leave the home, which was the statement he wished to hear. Counsel argue that plaintiff's actions thereafter in getting a witness to establish her alleged desertion and proceeding through with his suit for divorce and his refusal to entertain her attempts to bring them together again all support this contention.

There is no evidence in this record that either party used any physical violence toward the other or that the husband had been guilty of any misconduct which would render the life of his wife miserable, unendurable or even unhappy. They had some minor arguments, the principal one, according to counsel, was in the fall of 1953, a few months before they separated. It had to do either with giving or loaning the son of the plaintiff a substantial sum of money with which to start farming. According to the testimony,

the defendant at this time became angry and refused to consent to the use of any part of her money for that purpose. Plaintiff testified that he never asked her about this matter again and defendant's testimony is that he did.

Under the authorities, in order to support a charge of desertion by the spouse who physically leaves the home, the reasonable cause that justifies the departing spouse in leaving must be such that it would, of itself, entitle the party abandoning the home to a divorce. (LeCarlo v. LeCarlo, 8 Ill. App. 2d, 168; Nusser v. Nusser, 4 Ill. App. 2d, 538, 544; see also Hellrung v. Pellrung, 321 Ill. App. 383) In the instant case the evidence justified the conclusion of the chancellor that the defendant was guilty of desertion. (Schneider v. Schneider, 286 Ill. App. 575, 577)

to appellee's
According to ~~xxxxxx~~ testimony, appellant, three weeks before he left, said to him: "You fat, Irish son-of-a-bitch, if that is the way you want to live, pack your suitcase and get out of here." Two days before he left she said if he didn't get out she would call the sheriff and during the month before he left appellant requested him to leave every day. On the day he left or the day before he gave her a check for \$70.00 and said to her that that amount would be enough to run the house and she replied that if that was all he was going to give her he could get out. Mr. VanLandingham corroborated appellee's testimony to the effect that on February 3, 1954, just before appellee did leave, appellant said to Mr. VanLandingham that she had told appellee that he should leave the house and continued: "Absolutely, I mean every word I said. I want you (indicating plaintiff) to take your clothes and get out." The chancellor did not err in

finding that appellee had reasonable cause for leaving the family home.

Defendant seeks to excuse such conduct and language by insisting that plaintiff systematically provoked her and quarrelled with her until she became hysterical. The record, however, refutes this and fails to disclose any proper justification for the ultimatum the defendant delivered to the plaintiff. It might be noted that the sworn complaint alleged that on February 3, 1954, defendant ordered the plaintiff to leave the home then owned by defendant. The verified answer and the amended verified answer of appellant both denied this allegation, but upon the hearing appellant did not deny that she had requested her husband to leave and did not refute the testimony of Mr. VanLandingham.

The facts in *Nusser v. Nusser*, 4 Ill. App. 2d, 538, and *Bramson v. Bramson*, 4 Ill. App. 2d, 249, cited and relied upon by appellant, are not analogous to the facts as disclosed by this record and there is nothing said in either case at variance with our conclusion here.

The chancellor did not err in his conclusion that no bona fide attempt was made by defendant to have plaintiff return to their home and resume their former marital status during the year following their separation. The decree granting plaintiff a divorce and dismissing the counterclaim of the defendant is sustained by the evidence and is therefore affirmed.

Decree affirmed.

Concurs
Evans, J. Concurs.

IN THE

FILED

APPELLATE COURT OF ILLINOIS

APR 5 - 1956

SECOND DISTRICT

JUSTUS L. JOHNSON

FEBRUARY TERM, A. D. 1956.

Clerk Appellate Court Second Dist.

WALLY LA PLACA,
Plaintiff-Appellant,

-vs-

CHARLES LA PLACA,
Defendant-Appellee.

CHARLES LA PLACA,
Counter-Plaintiff-Appellee,

-vs-

WALLY LA PLACA,
Counter-Defendant-Appellant.

9 I.A. 513

Appeal from the
Circuit Court of
Kane County.

CROW, J.

This is an appeal by the plaintiff-counterdefendant from an order entered in a partition suit, allowing as costs a fee of Two Thousand (\$2,000.00) Dollars for the defendant-counterplaintiff's attorney, for prosecuting a counterclaim, as amended and supplemented, for partition, both in the Circuit Court and the Supreme Court, the plaintiff-counterdefendant having previously taken an appeal from the original decree for partition. The Circuit Court's decree of partition was affirmed by the Supreme Court in LA PLACA v. LA PLACA, 5 Ill. (2d) 468. The plaintiff and defendant are wife and husband, respectively, estranged, but still living in one of the properties concerned, though occupying different rooms therein. The original action, in the first instance, was a suit by the plaintiff for separate maintenance, which was thereafter dismissed on her motion.

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The defendant had counterclaimed seeking a partition of three parcels of real estate owned by the parties originally as joint tenants and subsequently as tenants in common. The plaintiff had admitted the right of partition as to two tracts, but denied the right of partition as to the third tract because, allegedly, it was the homestead of the plaintiff, and the defendant had not provided another homestead, and Section 16 of the Husband and Wife Act (CH. 68 ILL. REV. STATS., 1953, par. 16) had been urged as applicable. The decree for partition had found that neither party, under the circumstances, was entitled to assert homestead rights against the other; it did not provide for the assignment of a homestead interest upon partition, and did not provide for setting off \$1000.00 in the event the property should be sold; and it partitioned the property equally between the parties. The Supreme Court agreed with the trial court, held against the plaintiff's contentions, and affirmed the decree partitioning equally between the parties, saying, inter alia, that such "leaves each of them with precisely the rights which they possessed before".

After the affirmance and remandment of the original appeal by the Supreme Court to the Circuit Court, a sale of the properties was held, the proceeds of sale of the three tracts being \$25,050.00, and a petition for attorney's fees was thereafter filed by the defendant-counterplaintiff. The plaintiff-counterdefendant had notice thereof and of the hearing thereon and was present, by counsel, thereat. No answer or other pleading was filed thereto by the plaintiff-counterdefendant denying or questioning in any way the right to some attorney's fee as a part of the costs or the allowance of the same by the Circuit Court, and no objection, oral or written, was made by the plaintiff-counterdefendant in the trial court to some such allowance. The present order was entered on that petition, and it finds the interests of the parties were correctly set forth

[illegible]

in the counterclaim, as amended and supplemented, and that \$2,000.00 is a reasonable allowance in the premises.

The plaintiff's present notice of appeal prays that the order on that petition setting fees and allowing them as a part of the costs be reversed on the grounds that the fee allowed was excessive and unreasonable, and asks that the cause be remanded with directions to allow a reasonable attorney's fee, or that the Appellate Court determine a reasonable fee.

CH. 106, ILL. REV. STATS., 1955, par. 68, being Section 25 of the Partition Act, provides:

"In all proceedings for the partition of real estate, when the rights and interests of all the parties in interest are properly set forth in the complaint, the court shall apportion the costs among the parties in interest in the suit, including the necessary expense of procuring such evidence of title to the real estate as is usual and customary for making sales of real estate, and a reasonable fee for plaintiff's solicitor, so that each party shall pay his or her equitable portion thereof, unless the defendants, or some of them, shall interpose a good and substantial defense to the complaint. In such case the party or parties making such substantial defense shall recover their costs against the plaintiff according to equity."

The plaintiff now urges in her briefs on this appeal that she had interposed a good and substantial defense to the counterclaim for partition; that it is inequitable to allow any fee as a part of the costs where the proceeding is so hostile that she was required to employ separate counsel; and that the allowance here made of \$2,000.00 is unreasonable. The plaintiff has not, however, sought herein to recover her own costs, including her attorney's fees, against the defendant, which may possibly indicate some lack of complete confidence by the plaintiff in her own position.

Under the record before us the only question is the reasonableness of the allowance of \$2000.00. The plaintiff-counterdefendant having not in the trial court in any way, by a pleading in response to the pending petition, or objections to the de-

1990. *Los polvorines de San Beltrán y sus alrededores*, pp. 23

...and the total amount of the loan is \$100,000.

— the first time since 1960 that the number of people in the world has increased by more than 100 million in a single year.

10-10-68

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 01-09-2001 BY 60322 UCBAW

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

centering just below and to

defendant's evidence offered thereunder, or otherwise, challenged the right to some allowance of some fee as a part of the costs cannot now on appeal here raise that issue, if she has, for the first time. It is to be observed that even her notice of appeal to this Court does not raise any question as to the right to some allowance of some fee as a part of the costs, but states her only grounds to be the reasonableness of the particular figure which was allowed for that purpose, so it is highly doubtful whether the plaintiff has even here in this Court for the first time raised that issue as to the right to any allowance of any fee, though her briefs discuss the matter. A question not raised in the pleadings, nor in any other manner presented to or urged or raised in the trial court cannot be urged for the first time in a court of review; the Appellate Court simply reviews a case presented to the trial court and does not sit to try issues presented for the first time in the Appellate Court: HEDLUND et al. v. MINER et al. (1946) 395 Ill. 217; WOLLENBENDER et al. v. HOOVER et al. (1931) 346 Ill. 511; BISHOP v. BUCKLEN etc. (1944) 322 Ill. App. 529, First Dist. Those principles have been many times applied with specific reference to the right to an allowance for attorney's fees as a part of the costs in mortgage foreclosure and mechanic's lien foreclosure cases: CONTINENTAL INVESTMENT etc. v. WOOD (1897) 168 Ill. 421; SHAFNER et al. v. APPLEMAN et al. (1897) 170 Ill. 281; BECK COAL etc. CO. et al. v. H. A. PETERSON MFG. CO. (1908) 237 Ill. 250; MARSH W. MUCK et al. (1911) 159 Ill. App. 399, First Dist.; SAMPSON et al. v. NEELY etc. et al. (1903) 106 Ill. App. 129, First Dist. We perceive no reason why they are not equally applicable to the same question when presented, as here, in a partition case. It would have been a simple matter for the plaintiff to have made unquestionably clear in and to the trial court that she affirmatively objected to any allowance of any attorney's fee and to have specifically and affirmatively stated and presented that issue and her

The first question is whether the evidence is sufficient to establish that the defendant is guilty of the crime charged. The second question is whether the evidence is sufficient to establish that the defendant is guilty of the crime charged. The third question is whether the evidence is sufficient to establish that the defendant is guilty of the crime charged.

position thereon to the trial court. She did not do so. PEOPLE ex rel. etc. v. SCHLAESER etc. (1945) 391 Ill. 314, and HAMALLE et al. v. LEBENSBERGER (1915) 267 Ill. 602, referred to by the plaintiff in her reply brief, neither of which are partition cases or involve attorney's fees in a partition case, to the effect that a public statute need not be specially pleaded to permit reliance thereon, and that a Court will take judicial notice thereof, do not hold that no pleading at all of the substantive question or issue need be filed, and do not dispense entirely with the necessity for the plaintiff here in some reasonable manner, by pleading or otherwise, to raise the substantive question or make the substantive issue in the trial court by some plain and concise statement, written or oral, or action on her part, whether she specially pleads the statute or not. She cannot stand by, say nothing, and then for the first time ask the Appellate Court to determine the matter.

The plaintiff-counterdefendant offered no evidence before the Chancellor on the question of the reasonableness of \$2,000.00. The defendant-counterplaintiff's evidence on the reasonableness thereof was the testimony of W. Ben Morgan, a practicing lawyer for about 25 years, who is the defendant's attorney, and James A. Powers, a disinterested lawyer, of about 16 years practice at the bar of the county in which the proceedings were pending. Their testimony supports the allowance made as being reasonable, usual, and customary in Kane County. There is no evidence to the contrary. In addition, the Chancellor in such a case who has heard the matter, or portions thereof, and who has before him the files and record in the cause, from an examination of which whatever services the attorney rendered should be reasonably self-evident, the prior essential pleadings and decree in the present partition proceeding having been here stipulated to be a part of the record on the hearing of this petition for fees, is as familiar as anyone else, or more so, with the

usual, customary, and reasonable attorney's fees for services of this type in that county, and is entitled to use his reasonable judgment and discretion on this particular subject, derived from such files, records and other evidence as may be before him, and he has approved the same. We find nothing unreasonable in the conclusion of the trial court.

We think there is, under the circumstances, no substantial merit in the plaintiff-counterdefendant's contentions on this appeal, and we shall, therefore, affirm the order.

AFFIRMED.

Howe P. J. concurs.
Eccles J. concurs

...and, consequently, the reasonable attorney's fees for services in
this type of case, and is entitled to use his reasonable
judgment in connection with this particular subject, subject to the
such filing, records and other evidence as may be before him, and
he has approved the same. He filed another memorandum in the
connection of the trial court.

The trial court is, under the circumstances, no substantial
error in the plaintiff's complaint, and no substantial
error, and no error, and no error, and no error.

...and

James P. ...
James P. ...

General No. 10893

Agenda No. 8

IN THE
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

February Term, A.D. 1956

9 I.A. 574

FILED

APR 13 1956

JUSTUS L. JOHNSON
Clerk Appellate Court Second Dist.

ALBIA NARESH

Plaintiff-Appellant,

vs.

HENRY PRAETZ,

Defendant-Appellee.

APPEAL FROM THE

CIRCUIT COURT OF

OGLE COUNTY, ILLINOIS.

DOVE, F. J.

About midday on November 5, 1953, the plaintiff, Albia Naresh, was a guest passenger riding in the front seat of a Buick automobile then owned and being driven by Katherine Denmark whose sister occupied the rear seat of the car. These ladies were on their way from Chicago to Cedar Rapids, Iowa, and were proceeding in a westerly direction in the north city limits of Rochelle, Illinois, on a road referred to in the record as Creston Road or Creston Spur. State Route No. 51 is a north and south preferential highway and intersects Creston Spur.

About the same time, Henry Praetz, the defendant, was driving his 1949 Lincoln sedan in a northerly direction on State Route 51 approaching this intersection. He was

accompanied by his wife, Carrie May Fraetz, who was sitting in the front seat at the right of her husband. Within the intersection the cars came into collision. The plaintiff was severely injured and on February 24, 1953, she filed the instant complaint against Henry Fraetz to recover for those injuries. The defendant answered denying that the plaintiff was in the exercise of due care and denying the several charges of negligence. The issues thus made were submitted to a jury resulting in a verdict and judgment for the defendant and the plaintiff appeals.

Counsel for appellant insists (1) that the weight of the evidence discloses that the defendant was guilty of the negligence charged; (2) that the plaintiff was not guilty of contributory negligence; (3) that the trial court erred in admitting in evidence an enlarged photograph of the intersection where the collision occurred; and (4) that the court gave an excessive number of instructions.

The plaintiff testified that she was a widow, sixty-one years of age, living in an apartment in Berwyn; that on the morning of November 5, 1953, she left her home about nine o'clock in the car of her friend, Mrs. Katherine Denmark, whose sister was seated in the back seat. Katherine Denmark was driving and the plaintiff sat at her right in the front seat. The three ladies had prepared a lunch which they had with them and the party intended to cross Route 51 and then stop and eat their lunch. She testified the driver did stop the car six or eight feet from a stop sign. As abstracted she then testified: "I was doing things on the seat with the lunch and was looking at what I was doing. When she (the driver) stopped I saw a sign. I wasn't interested, because

I was fixing the lunch and concentrating on it. That was true while I was coming down this road and I didn't look anywhere. When she (the driver) started up again, I was still fixing the lunch. I heard a yell from Mrs. Denmark's sister in the back seat and I was scared to look and I saw a car coming. I don't know if it was coming when our car started out into highway 51. I didn't know until I heard that yell. I looked up and I saw that car and very quickly I heard a boom and that's all I know. I don't know whether our car skidded before the collision and I don't know what parts of the cars were damaged. It seems to me like the collision was in the middle of the intersection. The other car seemed to be coming in the middle of the street. I don't know which side of the street Mrs. Denmark was driving on. ----- I don't know how fast Mrs. Denmark's car was going at the time we went into the intersection or how many feet it travelled before the two cars came together." After testifying that the driver of the car in which she was riding stopped six or eight feet from the stop sign on Creston Road at its intersection with Route 51, the plaintiff was then on cross-examination asked/whether she ever charged or alleged or claimed that Mrs. Denmark did not stop at the stop sign and she answered "No." She was then asked if she ever brought a suit against Mrs. Denmark's administrator and she again replied in the negative.

Henry Praetz, the defendant, testified that he was 73 years of age at the time of the accident and lived a mile east of Route 51; that he and his wife had been shopping at Rochelle and were returning to their home at the time the accident happened. He further testified that it was a nice

day, the pavement dry, the visibility good and he had no difficulty in seeing the route he travelled; that he was driving a 1949 Lincoln sedan and had been driving a car since 1916; that his brakes and car were in good mechanical condition; that as he drove north on Route 51, he passed the consolidated school building on the left and as he passed the high school a little to the north he saw an automobile waiting to get on Route 51 on his left; that this automobile was on the shoulder approximately one hundred feet south of the intersection of Creston Road and Route 51; that as he approached Creston Road he glanced in the rear view mirror and he saw a car behind him, which he judged was about one hundred feet from the intersection; that while travelling this one hundred feet, he looked to his right and at that time he thought he was probably fifty feet from the intersection; that he could look down Creston Road for one hundred fifty feet but he saw nothing on that road. He further testified that prior to the collision he did not see the automobile with which his car collided; that as he came up to the intersection he did see something coming at a terrific speed, but that he couldn't tell what it was and that he had not travelled ten feet before it ran into him. This witness further testified that just before the accident he was looking straight ahead; that he didn't slow up his car at any time from the time he was within one hundred feet back of the Creston Road intersection; that he was travelling between twenty-five and thirty miles an hour and in answer to the question, "At what speed do you think you were travelling when you went into that intersection?" the witness replied, "Probably twenty-five to thirty--I don't know." The

witness then continued: "I saw a car coming behind through the rear mirror. At the time of the collision I was on the right-hand side of Route 51 and she plowed into me. I don't know how many feet she would be over on 51. At the time of impact my left-hand wheel was on my own side of the dividing line. I saw something just at the last moment sort of flash up. I did not blow my horn at any time before I came to the intersection. I know that there was considerable traffic on Route 51 at all times on that day. At the time of the accident, there was traffic coming toward me quite a ways down the road, but it wasn't close enough so that it was bothering me in any way. I was hit on the right-hand side and the front door was smashed in. It is a two-door car. The door was smashed in toward the front from the middle post and also toward the rear. There was no damage to the front of my car. After the collision my car was straddling the center line. It just whirled around and set it over a little west. I was headed south and she was headed west. I never turned to the left of the course I was taking at any time before the collision. Just before I came into the intersection I was probably talking to my wife, but I don't remember. I had been talking to her up to that time. I didn't say anything to her about the automobile on the left side of the road. The flare of cement that goes in on Creston Road is about eighty feet wide. It is flat cement and there are no hills or anything to keep me from seeing. When I was fifty feet back from the north edge of the intersection, when I was going into it, if I looked to the right, I probably could have seen as far as that cutoff of alternate 30 into Rochelle, but I didn't see any car and I had the right of way. When

my car came to rest, it was about forty feet from the Buick. It was standing east and south of my car. My car turned around when it was hit. I don't know which way it turned, but it was headed south when it came to a stop. The Buick was not inside of Route 51 when the accident was all over. I wasn't able to get out of the car for a few minutes. There was no automobile close to me going in the same direction that I was. None close enough for me to have to watch. Creston Road comes to a dead-end on Number 51. You can go straight through heading west on the little blacktop, but it is not a real highway. Going west on Creston Road, just before you come to highway 51, on your right is the Banning Station, on the left is the Dentler Station, which is the southeast corner of the intersection. My car was standing on its four wheels when this was all over. None of my tires were blown out. My brakes were good, but I had not applied them at any time before the collision. They are hydraulic brakes and I didn't touch them at all. I talked to my wife after I got out of the car and a young fellow came up to the car to help me out and I said, 'Wait a minute until I get my bearings.' I was right in the center of the intersection when the accident occurred. At the deposition last Saturday I stated that I was probably halfway across the intersection when the accident occurred. That is what I mean by being in the center. I never saw the Buick. I didn't see the Buick until after it came to a stop. Before the accident, I didn't see it."

Carrie May Fraetz, wife of the defendant, testified that she was sitting on the front seat at the right of her husband as they were proceeding north on highway 51; that a

white line divided the pavement and they were travelling on the right or east traffic lane; that she did not observe the car in which the plaintiff was riding until it was "right on us and I didn't check our speed on the speedometer at any time before the impact. ~~that~~ The car in which we were riding was struck on the right side. ~~that~~ The collision occurred at the center of the intersection and I was injured. After the collision the car in which I was riding was facing south on the west side of the road."

James Smith testified on behalf of defendant that he was 24 years of age and was sitting in a parked car headed east on the east side of Route 51 at the intersection in question at the time of the collision; that he observed the defendant as he was driving north and that he was travelling about thirty miles per hour; that he observed no other car going north at that time, but did see the Buick travelling about forty miles per hour headed west and it did not stop at the intersection; that the front end of it had passed over the center line of Route 51 and hit the side of the car of the defendant.

Donald Dentler testified on behalf of defendant to the effect that on the day in question he was operating the Mocony Oil and Gas Station located at the southeast corner of this intersection and was leaving the station to go home for dinner when he observed the Buick automobile on Creston Road approaching the intersection; that it did not stop and was travelling more than 30 and he thought approximately 40 miles per hour as it entered the intersection and struck defendant's car just across the center of the intersection on the east side of the dividing line; that as a

result of the impact defendant's car "made a complete spin winding up on the west side of U.S. 51 headed south"; that he observed the defendant's car just a moment before it was struck, but had no idea of the rate of speed it had been travelling.

Robert M. Fanning testified that he owned and was operating the Hicks Oil Station on the day of this occurrence; that at the time of the trial it was known as the Gulf Oil Station and located on a corner of this intersection; that he was using a telephone and was looking out of a window of the station and saw the Buick car about ten feet before it reached the stop sign; that it was travelling in excess of thirty-five miles per hour and it did not come to a stop before entering Route 51. This witness further testified that he did not see the defendant's car until after the collision.

Counsel for appellant state that the basic question presented by this appeal is whether the defendant will be permitted to assert that he used reasonable care because he looked and failed to see an approaching car which was in plain sight. Under the authorities, the plaintiff had the burden of proving by the greater weight of the evidence that the proximate cause of the collision which resulted in plaintiff's injuries was the negligence of the defendant and that the plaintiff was in the exercise of due care for her own safety. These are questions of fact to be determined by the jury. We have set forth the evidence at length. The jury saw and heard the witnesses and its findings should not be disturbed unless the record discloses some prejudicial error in the admission of evidence or the instructions of the court.

Defendant's Exhibit 4 is a certified copy of a complaint filed on February 3, 1955, in the Superior Court of Cook County by Albia Marosh, the instant plaintiff, against Irene Pecinka as administrator with the will annexed of the estate of Katherine Denmark, deceased, wherein plaintiff alleged she was a guest passenger of Mrs. Denmark on November 5, 1953, upon the occasion in question and charged the driver of the car in which she was riding with wilful, wanton and malicious acts and among the acts so enumerated was her failure "to stop at a stop sign erected for that purpose." This exhibit was offered and admitted in evidence by the court over the objection of counsel for the plaintiff as to its competency.

Counsel for appellant calls our attention to the evidence of the plaintiff to the effect that appellant had never seen this complaint before it was shown to her and on the witness stand upon the trial of this case; that she had not signed it in person but only by attorney and argues that "it is among the more serious shortcomings of this exhibit that it does not impeach the plaintiff or anyone else." In connection with this exhibit counsel for appellant testified in the instant proceeding that he represented the plaintiff in the Superior Court of Cook County, prepared this exhibit from the report of the state police which came into his hands and which was offered in evidence by appellant and admitted without objection on behalf of appellee.

Admissions in pleadings are admissible in evidence and the fact that the complaint filed by plaintiff in the Superior Court of Cook County was not signed or verified by her, but by her counsel, did not render it incompetent. In

the instant trial plaintiff had testified that the driver of the car in which she was riding stopped at the intersection stop sign. In her complaint filed on February 3, 1955, she alleged that the driver of this same car failed to stop at this stop sign. The jury had the benefit of the testimony, not only of the plaintiff, but of her attorney, who represented her in the Superior Court proceeding and who prepared the complaint in that court for her. The trial court, in overruling plaintiff's objection to the pleading as incompetent, as suggested by counsel for appellant, that stated/it was admitted into evidence for impeachment purposes only and not as any proof of any of the facts in issue in the case being then tried. As so limited, the court did not err in its ruling. (Dwyer v. Dwyer, 265 Ill. App. 155.)

Without objection, two photographs of the intersection, taken within ten days after the accident and offered in evidence by the defendant, were admitted in evidence as were four pictures of the cars involved in the collision. Defendant's Exhibit No. 1 is a soft map print 16 3/4 inches by 19 3/4 inches. It depicts a scene looking west along Creston Road and the intersection of that road and Route 51. It shows a diamond-shaped sign with the words "Stop ahead" and also shows the customary "Stop" sign near this intersection. The Gulf filling station is shown at the northeast corner of the intersection and the nearby trees which are shown bear considerable foliage and a number of cars and trucks also appear in the picture. The defendant, while on the witness stand, was asked this question by his counsel: "Mr. Praetz, I now hand you Defendant's Exhibit 1 for identification and ask you if that correctly portrays the intersection of the connecting road between U.S. Alternate 30 and State Route

51, as of November 5, 1953, with the exception of the fact that the station that appears in the northeast corner is now designated as Gulf Oil Station and at that time it was known as Hicks Oil Station, operated by Robert Banning, and the foliage and trees didn't appear at that time, and the automobiles are not correctly identified as being at the scene of the accident on November 5, 1953?" To this question the defendant answered: "No, I don't suppose----." He was then asked this question by his counsel: "Other than that, would you say that correctly portrays the scene coming to the west, and of the intersection of those two roads?" Answer: "Yes." Counsel for defendant then said: "If the court please, I want to offer in evidence Plaintiff's Exhibit 1." Mr. Knight, counsel for the plaintiff, then said: "If counsel has other pictures, it would seem to me that conditions are so changed here in this enlarged photograph. This is an enlargement?" Counsel for defendant answered: "Yes." Mr. Knight, counsel for plaintiff: "It was taken at such a different time of the year, it doesn't correctly portray the visibility of one who would be going north, looking east." Counsel for defendant: "I have other photographs. I have noted the exclusions in my identification." The Court: "With the understanding as to the exceptions, it may be admitted."

Counsel for appellant insists that the court erred in admitting this enlarged photograph. He argues that this exhibit tends to give some logical support to the assertion that the defendant could have looked down the road on which plaintiff was travelling and have seen nothing, the reason being that the southeast corner of the intersection,

as well as the southwest corner and all of Route 51 south of the intersection, as shown in this exhibit, is obscured. Counsel continues: "The net effect of these props, is to depict the plaintiff's car as moving into a blind spot in approaching the intersection, whereas, in fact, there was a completely unobstructed view, as may be seen from the other exhibits and the only possible effect that Defendant's Exhibit 1 has is to confuse the issue in the minds of the jury. It was a gross impropriety to tender the exhibit and it was prejudicial error to admit it in evidence." It will be noted that counsel simply called the attention of the court to the changed conditions existing when this picture was taken from what they were at the time of the occurrence in question, inquired of counsel whether it was an enlargement and was told that it was and so far as the record discloses, no specific objection was interposed by counsel.

Furthermore it appears that while defendant was testifying he was handed a photograph of this intersection and the record shows this is what occurred. Counsel for defendant: "I now hand you Defendant's Exhibit 3 for identification and ask if that correctly portrays the intersection of the connecting road between U.S. Alternate 30 and State Route 51 on November 5, 1953, with the exception that there might have been some cars located on and along the intersection there?" Answer: "There could have been some cars sitting here, I don't remember." Question: "Other than that does that correctly portray the intersection?" Answer: "Yes sir." Counsel for plaintiff then inquired: "When was this taken?" and counsel for defendant replied, "I

believe it was taken a few days after the accident within a week or ten days." Counsel for plaintiff then asked: "You are facing west?" Counsel for defendant: "You are facing west, yes sir." Counsel for plaintiff: "No objection." The Court: "Defendant's Exhibit 3 may be admitted in evidence." In his argument counsel for plaintiff states that Defendant's Exhibit No. 3 shows approximately the same view as Defendant's Exhibit No. 1. We have examined the several photographs offered and admitted in evidence and the evidence offered in connection therewith. The trial court, upon this record, did not err in admitting in evidence Defendant's Exhibit No. 1.

While counsel for appellant states at the beginning of his brief that plaintiff's theory of this case is that the verdict of the jury is against the manifest weight of the evidence, that the defendant was guilty of negligence as a matter of law and that the verdict is the result of prejudicial and misleading evidence erroneously admitted by the trial court, counsel also insists in his argument that the court gave a prejudicial number of instructions. The trial court certified that he gave eight instructions tendered by the plaintiff and 17 tendered by the defendant. Notwithstanding the motion for a new trial simply stated that the "court erred in refusing to give certain proper instructions offered in behalf of the plaintiff" and that the "court erred in giving each and every instruction tendered by the defendant and given in said cause," we have examined the instructions and, taken as a series, we believe they informed the jury as to the applicable law and the cause of the plaintiff was not prejudiced thereby.

Finding no reversible error in this record, the
judgment of the Circuit Court of Ogle County is affirmed.

✓ Judgment affirmed.

J. Court
concur

Ervaldi G. Concur

January 1951

337 A

General No. 10857

Agenda No. 5

IN THE

APPELLATE COURT OF ILLINOIS

FILED

APR 30 1956

SECOND DISTRICT

91A.534

JULIUS R. RICHARDSON

Clerk Appellate Court Second Dist.

Pro Tempore October Term, A. D. 1955.

EARL WAINWRIGHT,

Plaintiff-Appellee,

vs.

ELGIN WINDMILL COMPANY, an
Illinois Corporation,

Defendant-Appellant.

APPEAL FROM THE

CIRCUIT COURT OF

ROCK ISLAND COUNTY,
ILLINOIS.

DOVE, P. J.

This is an action brought by Earl Wainwright, doing business under the name of Port Byron Implement and Hardware Company, hereinafter referred to as plaintiff, against Elgin Windmill Company, an Illinois corporation, hereinafter referred to as defendant, to recover the amount paid by plaintiff to the defendant for 650 bales of baler twine which the defendant had sold to the plaintiff. The basis of plaintiff's suit is that the baler twine was unmerchantable and unfit for the purpose for which it was intended and, therefore, defendant was guilty of a breach of warranty, in violation of the Uniform Sales Act of Illinois (Ill. Rev. Stat., Chap. 121 $\frac{1}{2}$). A trial by jury was had which resulted in a verdict in favor of the plaintiff in the sum of \$8919.40,

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JULIUS R. RICHARDSON

1. *Chlorophyll a* (Chl a) is the primary photosynthetic pigment in most plants and algae. It is a green pigment that absorbs light energy in the blue and red regions of the visible spectrum. Chl a is essential for the light-dependent reactions of photosynthesis, where it converts light energy into chemical energy in the form of ATP and NADPH.

Pro Tempore

100 (74.0) 70.0 (50.0) 50.0 (35.7) 35.7 (25.0)

the amount which the plaintiff had paid the defendant for the twine. Motions by the defendant for a new trial and for judgment notwithstanding the verdict were made and overruled and from a judgment rendered on the verdict, defendant appeals.

Defendant insists that the evidence discloses that plaintiff accepted and paid for the baler twine after he had examined the same or had an opportunity to examine the same and after he had full knowledge of its condition; that if there were any breach of warranty by the defendant as to the twine, notice of such breach of warranty was not given to the defendant within a reasonable time, and, that plaintiff did not return or offer to return the twine. Plaintiff insists that the evidence shows that the defendant expressly or impliedly warranted the twine to be of good quality, free from defects, and fit for the purpose for which it was intended; that the defects and unfitness of the twine for the purpose intended were not susceptible upon mere inspection of the twine but could be ascertained only after actual use under baling conditions and that the payment by the plaintiff for the twine did not constitute such an acceptance as precluded him from asserting the warranty and recovering the purchase price. Plaintiff asserts that he gave timely notice to the defendant of the unfitness of the twine.

The record discloses that the plaintiff, a hardware and farm supply merchant, had been engaged in handling baler twine since 1942 and had sold large quantities of twine to farmers in his community. On January 17, 1952, W. E. Smith, a representative of the defendant, called at the plaintiff's

store and took an order from plaintiff for 750 bales of baler twine at \$13.85 a bale. This order was transmitted by Smith to the defendant and accepted. The twine arrived by freight on February 14, 1952, and was unloaded the next day. Plaintiff received an invoice from the defendant for this twine in the amount of \$9002.50, which was to cover the 650 bales included in this shipment. When the order was taken, plaintiff specified the twine must not be Mexican twine, but an inspection of the twine when it arrived showed that it was made in Mexico. The bales of twine were counted when they were unloaded and there was a shortage of 6 bales, and after allowing a credit of \$83.00 for the shortage, plaintiff paid the balance of the invoice, amounting to \$8919.40, which payment was made by check dated March 29, 1952. The balance of the order of 100 bales was cancelled. At the time the twine was received, plaintiff opened one of the bales (each bale contained two balls of twine) and noticed it was made in Mexico, but made no further inspection of the twine at that time and later, in February, showed the twine to a customer and thereafter sold several bales.

Upon the trial, the plaintiff testified that he started to take orders for baler twine from farmers around March or April, 1952; that the first delivery of twine was made to the son of Russell Thompson followed by sales and deliveries to Clarence Weldenman, Robert Walgrave and Charlie Duggie, all aggregating about 100 bales. The plaintiff further testified that complaints were made by all the purchasers and most of the 100 bales were returned to the plaintiff and that he had these bales and all of the balance of the carload, except the few bales that were never returned,

upon his premises at the time of the trial in the original condition in which the bales were received and that they were being kept in a dry, safe storage place. The plaintiff further testified, without objection, that if a verdict was returned for the plaintiff the merchandise was available to be returned to the defendant.

As abstracted by counsel for appellant, the plaintiff then testified, without objection: "After I started to get complaints, I called Mr. Smith (appellant's salesman) immediately on long distance. I called after May 15, 1952, and told him we were having trouble with the baler twine and to come down and see me immediately. He said he would get a man that could work on the balers and would be down in a day or two. He did not appear after that and I later contacted him when no one appeared. I called him three or four times, 3 or 4 days apart. In the second conversation, I asked him why he hadn't appeared, and he said he couldn't get hold of his man. I talked with him at least 4 times. He never showed up at my place of business afterwards. We had 3 or 4 customers that wanted to take twine out and try it. I took sick around the 15th of June and it was before that. The last time any was sent out of the store was prior to June 15 when I became a patient in a hospital."

Plaintiff further testified that he had had a heart attack on June 15, 1953, and remained in the hospital for four and one-half months and in bed at his home for nine months thereafter; that his wife was also under a doctor's supervision and as a result thereof his business was suspended after June 15th and his store was closed and remained closed during the early summer of 1952.

the following
On September 23, 1952, the defendant received/~~xxx~~
letter, omitting the address and signature, written a few
days earlier by the wife of the plaintiff: "This is to
my deepest regret that I have to write to you. My husband
had a very serious heart attack June 12, 1952, and was in
Moline Lutheran Hospital two months, and is now confined at
home in a hospital bed under care of Dr. Ollis, Moline, Ill.
Doctor says, it will be years before he will work again. He
has a ruptured heart four different places and will not be
able to walk in yard until next summer sometime. I haven't
been able to sell hardly any twine we received from you Jan.
17, 1952, Invoice No. E 10000, 650 bales, price \$6002.50.
They all look at the trademark (Mexican). They don't want it.
Is there something the matter with the twine? I have only
sold around two dozen bales. You don't know how I would
appreciate it if you will try and sell it for me. We had to
borrow the money. I won't be able to sell enough to pay it
off. The interest will eat it up. There may be parts where
this will sell like hot cakes but I can't sell it. It sells
here around \$15.85 a bale. This isn't doing your twine mfg.
any good either. And the hardship it will cause me. So
please answer and please sell it so I won't have to lose
as I have the interest on note to pay. Once again, please.
I sure will appreciate everything you can do for me to sell
it for me. Please answer."

On September 25, 1952, appellant replied as
follows: "Dear Mrs. Wainwright: Your letter received several
days ago. Certainly came as a shock to us, and we are indeed
sorry to hear that Mr. Wainwright has been so seriously ill.
In order to put your mind at ease, we are enclosing a folder

on the baler twine which you purchased. You will note that this guarantees it to be the quality of any domestic twine being distributed by any of the domestic distributors. If you will open up a bale of this twine and put it out where your farmer customers can see it, we are sure they will not hesitate to purchase this twine at a saving of from two to three dollars a bale. Of course you realize that the season for using this twine is about over for this year, but we will do all we can to recommend it to our customers and have them contact you. Shipments of twine were made directly to our customers, and we have never carried any twine in our inventory. However, we certainly will keep you in mind on any small requirements that our customers may need."

Charles Brown, Robert Walgrave, Clarence Weidenman and Russell Thompson, farmers living in the vicinity of Port Byron, all testified upon the trial on behalf of the plaintiff that they had purchased some of this binding twine and endeavored to use it on their balers. Their testimony was to the effect that the twine would not go through the baler, that it was uneven, thick and thin in spots, would unravel, coil up and miss tying some of the bales; that the twine would "bawl" up through the tension and the needles would break the thin places; that it would keep breaking and form in loops and would clog up the machine. All these witnesses testified that the twine was useless for the purpose intended, that they either returned the twine to the plaintiff or threw it away and the plaintiff received nothing for it. These witnesses also testified that they had to replace the twine which they purchased from plaintiff with other twine which worked satisfactorily in the same balers

they used when trying to operate with the twine which they bought from the plaintiff.

On behalf of the defendant, Harry Kelly testified that he was a resident of Elgin, had been farm advisor for Kana County Farm Bureau for nine years and was experienced in farming and farm machinery, including balers. He further testified that he had examined and tested some of the baler twine involved in this proceeding at plaintiff's place of business a week before he testified and found it of uniform diameter and very strong.

Walter Smith testified on behalf of defendant that he worked for defendant from November 1, 1950, until February 9, 1952; and procured the order from the plaintiff for this twine; that he had never worked for defendant since that time and never had any conversation over the phone with the plaintiff at any time.

No one ever came to plaintiff's place of business from defendant's office to inspect the twine or aid in selling it until after this suit was started and the witness, Harry Kelly, came only for the purpose of inspecting it and testifying upon the trial. Whether the twine was defective and whether there was a breach of warranty as to quality and fitness and whether reasonable notice of the breach of warranty was given to defendant by plaintiff were all questions of fact which the jury resolved in favor of the plaintiff. Upon this record we are unable to say that the verdict of the jury finds no support in the evidence.

There are other conflicts in the evidence. The plaintiff testified he gave the order for this twine to Walter Smith. A. Gordon Heitman, secretary and treasurer of defendant,

They had then tried to transfer the same to the
house from the outside.

On finding it so difficult, they had decided
that they would try to get in by the back door. The
back door was closed but they had a key and they
in (about) the back doorway. They had then
realized that as the door was closed and they were
unable to get in they had decided to try to get in
by the front door. They had then decided to try to
get in by the front door.

They had then decided to try to get in by the
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get in by the back door. They had then decided to
try to get in by the back door. They had then
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had then decided to try to get in by the back door.

On the way back to the house they had decided
that they would try to get in by the back door.
They had then decided to try to get in by the
back door. They had then decided to try to get in
by the back door. They had then decided to try to
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testified that Orval Graening, sales manager of the company took the order for this twine over the phone from Earl Wainwright, the plaintiff, and that all Walter Smith had to do with this transaction was to quote the price. Mr. Meitman further testified that this twine originated in Mexico; that Smith was a salesman authorized to sell the company's products at Port Byron and had authority to make representations concerning those products. The plaintiff denied having any telephone conversation with Orval Graening with reference to this order and insisted it was given to Smith on January 17, 1952.

The controlling issue in the case is whether or not plaintiff gave timely notice of the breach of warranty to the defendant. The Uniform Sales Act (Ill. Rev. Stat., chap. 121½, sec. 48) provides: "The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them." Section 49 of the same Act provides: "In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor."

It is not necessary that the notice required be in any particular form or in any particular words. The question of what is a reasonable time to give notice of a breach of warranty is ordinarily a question of fact for the jury. (Mayflower Sales Co. v. Frazier, 325 Ill. App. 314.) It becomes a question of law only when all reasonable minds would reach the conclusion that the notice was or was not given in time. In Truslow and Fulle v. Diamond Bottling Corp., 112 Conn. 181, 151 Atl. 492, 71 A.L.R. 1142, the court discussed the purpose of the giving of notice to the seller of a breach of warranty and stated (71 A.L.R. 1142 at 1147): "The purpose of the provision requiring such a notice is clearly to give the seller timely information that the buyer proposes to look to him for damages for the breach, that the former may govern his conduct accordingly. Such notice need take no special form, but it must be such as fairly to apprise the seller of that intention. (Citing cases.) Where the question whether proper notice was given depends upon the construction of a written instrument, or the circumstances are such as lead to only one reasonable conclusion, it will be one of law; but where the conclusion involves the effect of various circumstances capable of diverse interpretation, it is necessarily one of fact for the trier."

In Nashua River Paper Company v. Lindsey, 249 Mass. 365, 144 N.E. 224, in discussing the form of the notice necessary, the court said: "Without attempting to lay down a general rule of construction as to the substance of the notice of the breach of warranty which the buyer must give, after acceptance of the goods, in order to hold the seller liable, it seems clear that it must refer to particular sales,

so far as that is practicable; that it must at least fairly advise the seller of the alleged defects;^{and} that it must be such as to repel the inference of waiver. Although it need not necessarily take the form of an express claim for damages or threat of such, it ought to be reasonably inferable therefrom that the buyer is asserting a violation of his legal rights."

The telephone calls, which the plaintiff testified he made to the defendant, and the letter that plaintiff's wife wrote to the defendant at plaintiff's request, and which was received by defendant on September 28, 1962, warranted the court in submitting to the jury the question whether sufficient notice had been given to the defendant that the twine was unfit for the purpose for which it was intended and that the plaintiff intended to rely upon the seller's warranty of fitness. (Hubshman v. Louis Keer Shoe Co. (Ill. 1942), 129 Fed. 2d 137.) It is evident from the nature of the goods involved that the defects in the quality or fitness would not become apparent until actual use was made of the goods, and the buyer could not, therefore, be expected to make a complaint until actual tests, under field conditions, of the twine had been made. The mere acceptance by the plaintiff of the twine upon its arrival under the circumstances of this case did not require that he give notice at that time of a breach of warranty. (Hodgman v. State Line and Sullivan R.R. Co., 45 Ill. App. 395. See also annotation in 71 A.L.R. 1142, et seq.) Neither did the payment by the plaintiff for the twine constitute a waiver by him of his right to rely upon a breach of warranty. (Kingman v. Meyer Bros., 70 Ill. App. 476.) Nor is it required that the buyer

return or offer to return the merchandise as a condition precedent to bringing suit for breach of warranty (Ill. Rev. Stat., chap. 121 $\frac{1}{2}$, sec. 69 (b) and 69 (4); *Burke v. Instant Heat Company*, 236 Ill. App. 275.)

It is also insisted that the court erred in not permitting the jury to take a sample ball of twine enclosed in the original package, which was produced on the trial, with it to the juryroom for examination. As we view the record in this case, the purpose for introducing the bale of twine in evidence was to show any markings or other means of identification upon the twine and not for the purpose of permitting the jury to test it to determine its strength and general fitness. It is our opinion that no useful purpose would have been served in permitting the jury to take the ball of twine with it to the juryroom, and we think the court was well within its discretion in refusing to permit the twine to be so taken. (Elliott v. Brown, 349 Ill. App. 428, 434; *The People v. Levato*, 330 Ill. 498, 510; *Painter v. The People*, 147 Ill. 444, 467; *The People v. Clark*, 301 Ill. 428, 431, 432.)

It is finally insisted that the court erred in refusing to give certain instructions tendered by the defendant and in giving certain instructions to the jury on behalf of the plaintiff. We have examined the instructions and considered this contention. The jury, however, was amply and adequately instructed. It resolved the issues made by the pleadings in favor of the plaintiff and its findings are warranted by the evidence found in this record. In the absence of any reversible error of law occurring on the trial, the judgment rendered upon the verdict of the jury must be affirmed.

Judgment affirmed.

CROW, J. Concurr,
EOVALDI, J. Concurr.

RETURN OF OFFER IN REGARD TO THE SUBSCRIPTION TO A COMPANY

People, 147 Ill. 444, 467; The People v. Clark, 301 Ill. 488,
484; The People v. Levato, 330 Ill. 498, 510; Painter v. The
(Elliott v. Brown, 349 Ill. App. 428,

*This opinion is withdrawn
filed 11/5/56 by [illegible]
minutes stated the
judicial opinion filed 4/30/56 by [illegible]*
337 A

General No. 10857

Agenda No. 5.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1955

EARL WAINWRIGHT,

Plaintiff-Appellee,

vs.

ELGIN WINDMILL COMPANY, an
Illinois Corporation,

Defendant-Appellant.

APPEAL FROM THE

CIRCUIT COURT OF

ROCK ISLAND COUNTY,

ILLINOIS.

DOVE, F. J.

This is an action brought by Earl Wainwright, doing business under the name of Fort Byron Implement and Hardware Company, hereinafter referred to as plaintiff, against Elgin Windmill Company, an Illinois corporation, hereinafter referred to as defendant, to recover the amount paid by plaintiff to the defendant for 650 bales of baler twine which the defendant had sold to the plaintiff. The basis of plaintiff's suit is that the baler twine was unmerchantable and unfit for the purpose for which it was intended and, therefore, defendant was guilty of a breach of warranty, in violation of the Uniform Sales Act of Illinois (Ill. Rev. Stat., Chap. 121). A trial by jury was had which resulted in a verdict in favor of the plaintiff in the sum of \$3919.40, the amount which the plaintiff had paid the defendant for the twine. Motions by the defendant for a new trial and for judgment notwithstanding the verdict were made

and overruled and from a judgment rendered on the verdict, defendant appeals.

Defendant insists that the evidence discloses that plaintiff accepted and paid for the baler twine after he had examined the same or had an opportunity to examine the same and after he had full knowledge of its condition; that if there were any breach of warranty by the defendant as to the twine, notice of such breach of warranty was not given to the defendant within a reasonable time, and, that plaintiff did not return or offer to return the twine. Plaintiff insists that the evidence shows that the defendant expressly or impliedly warranted the twine to be of good quality, free from defects, and fit for the purpose for which it was intended; that the defects and unfitness of the twine for the purpose intended were not susceptible upon mere inspection of the twine but could be ascertained only after actual use under baling conditions and that the payment by the plaintiff for the twine did not constitute such an acceptance as precluded him from asserting the warranty and recovering the purchase price. Plaintiff asserts that he gave timely notice to the defendant of the unfitness of the twine.

The record discloses that the plaintiff, a hardware and farm supply merchant, had been engaged in handling baler twine since 1942 and had sold large quantities of twine to farmers in his community. On January 17, 1955, W. E. Smith, a representative of the defendant, called at the plaintiff's store and took an order from plaintiff for 750 bales of baler twine at \$13.85 a bale. This order was transmitted by Smith to the defendant and accepted. The twine arrived by freight on

February 14, 1952, and was unloaded the next day. Plaintiff received an invoice from the defendant for this twine in the amount of \$9008.50, which was to cover the 650 bales included in this shipment. When the order was taken, plaintiff specified the twine must not be Mexican twine, but an inspection of the twine when it arrived showed that it was made in Mexico. The bales of twine were counted when they were unloaded and there was a shortage of 8 bales, and after allowing a credit of \$83.00 for the shortage, plaintiff paid the balance of the invoice, amounting to \$8912.40, which payment was made by check dated March 28, 1952. The balance of the order of 100 bales was cancelled. At the time the twine was received, plaintiff opened one of the bales (each bale contained 3 balls of twine) and noticed it was made in Mexico, but made no further inspection of the twine at that time.

When the baling season arrived the last half of May and the first part of June, the plaintiff commenced to sell the twine and disposed of several bales of it. Immediately after the sales of this twine were made, plaintiff started to get complaints from the purchasers. Several of the farmers to whom plaintiff sold twine testified at the trial, and they all complained the twine would not work, that it repeatedly broke and that it was unusable and unfit for baling. These witnesses all testified they had to replace the twine which plaintiff had sold them by other twine and that the twine used for replacement worked satisfactorily. There is abundant evidence in the record along this line and no evidence to the contrary. It was clearly demonstrated that the twine was defective and that there has been a breach of warranty as to the quality and fitness of the twine.

Immediately after the plaintiff began to get these complaints from his customers, he called the defendant's office and talked with someone there. He thought the person to whom he talked was W. F. Smith, the man who had sold him the twine. He advised the person to whom he talked of the complaints by his customers concerning the unfitness of the twine and the company promised to send a representative out to make an inspection of the twine and to see what the difficulty was. No one came and plaintiff called again after a lapse of some three or four days and received substantially the same promise from defendant that someone would come to inspect the twine. He testified he made at least four of these telephone calls to defendant at intervals of three to four days. Defendant denied receiving any such calls. On June 1., 1952, plaintiff suffered a heart attack and had to be hospitalized for several weeks, and after his removal from the hospital he had to remain at home in a hospital bed for several additional weeks. Because of his illness, it was necessary that his store be closed. In a letter written by plaintiff's wife, at the request of the plaintiff, and received by the defendant on September 23, 1952, defendant was informed about her husband's illness and that she was having great difficulty in selling the twine in question, stating that she had sold only about two dozen bales and that the customers looked at the Mexican trademark and stated they didn't want it, and she requested, by inference at least, that the defendant take the twine off of her hands because she couldn't sell it. The clear implication of this letter is the twine couldn't be sold because it wouldn't perform satisfactorily under baling conditions in that community. No one from the

defendant's office ever came to inspect the twine or to aid in selling it. The defendant produced a witness whose testimony tended to show that the twine was of proper quality and fitness and suitable for baling, but this testimony was discredited to a great extent because the witness was mistaken about the kind of twine plaintiff purchased, the witness being under the impression that it was "Javelco" brand of twine that was involved. The verdict of the jury resolved whatever conflict in the evidence with reference to warranty there might have been in favor of the plaintiff.

The controlling issue in the case is whether or not plaintiff gave timely notice of the breach of warranty to the defendant. The Uniform Sales Act (Ill. Rev. Stat. chap. 121, sec. 48) provides: "The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them." Section 49 of the same Act provides: "In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor."

It is not necessary that the notice required be in any particular form or in any particular words. The question of what is a reasonable time to give notice of a breach of warranty is ordinarily a question of fact for the jury. (*Keyflower Sales Co. v. Frazier*, 325 Ill. App. 314.) It becomes a question of law only when all reasonable minds would reach the conclusion that the notice was or was not given in time. In *Bruslon and Fuller v. Diamond Hottling Co.*, 112 Conn. 131, 151 Atl. 492, 71 A.L.R. 1148, the court discussed the purpose of the giving of notice to the seller of a breach of warranty and stated (71 A.L.R. 1148 at 1147): "The purpose of the provision requiring such a notice is clearly to give the seller timely information that the buyer proposes to look to him for damages for the breach, that the former may govern his conduct accordingly. Such notice need take no special form, but it must be such as fairly to apprise the seller of that intention. (Citing cases). Where the question whether proper notice was given depends upon the construction of a written instrument, or the circumstances are such as lead to only one reasonable conclusion, it will be one of law; but where the conclusion involves the effect of various circumstances capable of diverse interpretation, it is necessarily one of fact for the trier."

In *Mashun River Paper Company v. Lindsay*, 249 Mass. 366, 144 N.E. 924, in discussing the form of the notice necessary, the court said: "Without attempting to lay down a general rule of construction as to the substance of the notice of the breach of warranty which the buyer must give, after acceptance of the goods, in order to hold the seller liable, it seems clear that it must refer to particular sales, so far as that is practicable;

that it must at least fairly advise the seller of the alleged defects; and that it must be such as to reveal the inference of waiver. Although it need not necessarily take the form of an express claim for damages or threat of such, it ought to be reasonably inferable therefrom that the buyer is asserting a violation of his legal rights."

The telephone calls, which the plaintiff testified he made to the defendant, and the letter that plaintiff's wife wrote to the defendant at plaintiff's request, and which was received by defendant on September 23, 1954, warranted the court in submitting to the jury the question whether sufficient notice had been given to the defendant that the twine was unfit for the purpose for which it was intended and that the plaintiff intended to rely upon the seller's warranty of fitness.

(Hubshman v. Louis Keer Shoe Co., (Ill. 1942) 149 S.E. 2d 137.)

It is evident from the nature of the goods involved that the defects in the quality or fitness would not become apparent until actual use was made of the goods, and the buyer could not, therefore, be expected to make a complaint until actual tests, under field conditions, of the twine had been made. The mere acceptance by the plaintiff of the twine upon its arrival under the circumstances of this case did not require that he give notice at that time of a breach of warranty. (Housman v. State Line and Sullivan R.R. Co., 45 Ill. App. 335. See also annotation in 71 A.L.R. 1142, et seq.) Neither did the payment by the plaintiff for the twine constitute a waiver by him of his right to rely upon a breach of warranty. (Kingsman v. Meyer Bros., 70 Ill. App. 476.) Nor is it required that the buyer return or offer to return the merchandise as a condition

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States. The Commission is therefore unable to provide any information on this subject.

precedent to bringing suit for breach of warranty (Ill. Rev. Stat., chap. 121, sec. 69 (b) and 60 (4); *Burke v. Instant Heat Company*, 236 Ill. App. 275.)

It is also insisted that the court erred in not permitting the jury to take a sample ball of twine enclosed in the original package, which was produced on the trial, with it to the juryroom for examination. As we view the record in this case, the purpose for introducing the bale of twine in evidence was to show any markings or other means of identification upon the twine and not for the purpose of permitting the jury to test it to determine its strength and general fitness. It is our opinion that no useful purpose would have been served in permitting the jury to take the ball of twine with it to the juryroom, and we think the court was well within its discretion in refusing to permit the twine to be so taken. (*Goodrich v. Chicago Great Western Ry. Co.*, 149 Ill. App. 579; *Yohalem v. Metalone*, 225 Ill. App. 291.)

It is finally insisted that the court erred in refusing to give certain instructions tendered ~~by it~~ by the defendant and in giving certain instructions to the jury on behalf of the plaintiff. We have examined the instructions and considered this contention. The jury, however, was amply and adequately instructed. It resolved the issues made by the pleadings in favor of the plaintiff and its findings are warranted by the evidence found in this record. In the absence of any reversible error of law occurring on the trial, the judgment rendered upon the verdict of the jury must be affirmed.

Judgment affirmed.

Edward J. Connelley
Edward J. Connelley

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02 January 2005

Journal of Management Education 27(6)p. 609-622

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